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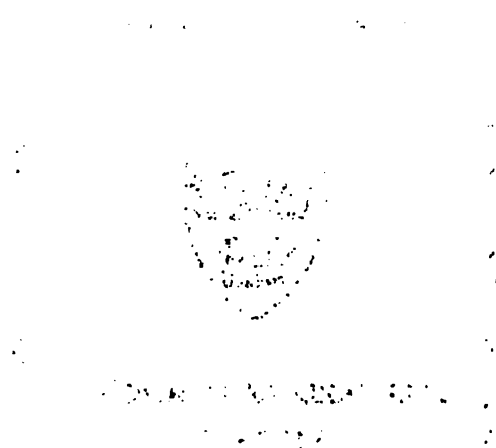
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REPORTS

OF

DECISIONS RENDERED

BY THE

SUPREME COURT,

OF THE

HAWAIIAN ISLANDS:

Admiralty, Criminal, Divorce, Equity, Law and Probate.

JULY TERM, 1888, TO OCTOBER TERM, 1886, INCLUSIVE.

HAWAIIAN REPORTS, VOL. V. 67

COMPILED BY WILLIAM FOSTER, CLERK SUPREME COURT.

o
HONOLULU:

HAWAIIAN GAZETTE CO. PRINT,

1887.

Rec. March 28, 1888

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS:

CHIEF JUSTICE AND CHANCELLOR,

HON. ALBERT FRANCIS JUDD.

FIRST ASSOCIATE JUSTICE AND VICE CHANCELLOR,

HON. LAWRENCE McCULLY.

SECOND ASSOCIATE JUSTICE,

HON. BENJAMIN HALE AUSTIN.

Died July 5, 1885.

HON. EDWARD PRESTON,

Appointed July 7, 1885.

ATTORNEYS GENERAL.

HON. PAUL NEUMANN, appointed December 15, 1883; resigned June 30, 1886.

HON. JOHN T. DARE, appointed July 1, 1886; resigned October 13, 1886.

HON. JOHN L. KAULUKOU, appointed October 13, 1886; resigned October 23, 1886.

The Supreme Court has original and appellate jurisdiction: cases reported in this book are only those decided by the Full Court, on appeal or exceptions.

The Legislature of 1886 increased the number of the Justices of the Supreme Court to five, [Statutes 1886, Chap. 59]: the new Justices, HON. RICHARD F. BICKERTON and HON. A. FORNANDER, first took part in the decisions of the Full Court at the January Term, 1887.

The decisions in this volume are printed from slips revised by the Justice writing the opinion: head-notes and index are by the compiler.

CORRECTIONS.

Page 51, line 8, "4 Hawn. Repts. 477": should be 577.

Page 116, line 8, "Section 272": should be 292.

Page 274, *passim*, "Chap. VIII. Laws of 1884": should be XVIII.

Page 280, 8d line from foot, "Chap. 61": should be 56.

Page 606, line 6, "Section 8": should be 18.

RULES

OF THE

SUPREME AND CIRCUIT COURTS,

HAWAIIAN ISLANDS.

In effect April 1, 1887, superseding all Rules hitherto promulgated.

I.

All petitions, answers, pleas, claims and special motions shall be fairly and legibly written on legal cap paper, with a caption showing the jurisdiction, cause and names of parties, and endorsed with the names of the parties and counsel filing the same.

II.

In Probate and Equity matters, parties in whose favor an order or decree is made shall immediately prepare and submit a draft of the same to the Justice for his approval.

III.

The Clerk or one of his deputies shall endorse on each document filed in Court the date of filing and his official signature, and no paper shall be withdrawn from the files except by the party filing it, and on his filing a certified copy thereof in its place, except in the case of recorded instruments, which may be delivered to the party on his receipt, which receipt shall set forth the date of the instrument, and the date, volume and pages of the record.

IV.

All appeals from the decision of any Justice of the Supreme Court at Chambers, or in Equity, Admiralty or Probate, must be

taken within ten days from the rendition of such decision, by paying costs accrued, and filing with the Clerk of the Court a bond in the sum of \$50 for costs to accrue, with a notice of appeal. All appeals duly taken shall be heard at the next regular term of the Appellate Court, unless sooner ordered by the Court.

V.

In lieu of a bond for costs of Court the Clerk may receive a deposit of the full amount in cash.

VI.

The Court will not hear any motion grounded on facts not verified by affidavit or the records in the case.

VII.

All agreed statements of facts and agreements to admit facts as proved, or to waive service, shall be in writing, signed by the parties or their attorneys, and filed with the Clerk.

VIII.

A. (EXPLANATORY OF SECTION 836 OF THE CIVIL CODE.)

Every exception taken in the progress of a jury trial, to any order or ruling of the Justice presiding, must be put in writing by counsel before the close of the trial. All such exceptions, the effect of which, if sustained, would be the granting of a new trial or the entry of judgment *non obstante veredicto*, must be embodied in a bill of exceptions, and presented to the Justice before the final adjournment of the term.

Such bill of exceptions should embody such portions of the evidence as is essential to the full understanding of the case.

B. (EXPLANATORY OF SECTIONS 1155 AND 1156 OF THE CIVIL CODE.)

An exception to the verdict as being contrary to the law and to the evidence or the weight of evidence, and a notice of a motion for a new trial on this ground, must be made at the time of the rendition of the verdict and before the jury are discharged; and noted by the Clerk on his minutes.

This motion must be perfected within ten days, by being put in writing by counsel and paying costs and filing a bond for costs to accrue, and if made by a defendant against whom a verdict has been rendered, a bond not to dispose of his property, as required by Section 1156 of the Civil Code, must be filed. Argument on this motion may be made before the Justice who presided at the trial, on his minutes.

Any party excepting to the ruling of the Justice, denying or granting the said motion, must present his bill of exceptions therefor to said Justice for allowance within ten days from the rendition of such ruling, pay costs and give a bond for further costs. Such bill of exceptions must embody the testimony.

C. Motions for a new trial, on account of misconduct of jury, for newly discovered evidence, and the like grounds, must be made in writing and filed with the Clerk within ten days after the rendition of the verdict; costs to be paid and a bond for further costs filed within ten days, and thereafter to follow the course prescribed in the latter part of the subdivision *B*. All matters of fact upon which such motion is founded, not appearing on the record, must be substantiated by affidavit.

D. In jury waived cases exceptions to findings of fact or of law must be perfected by paying costs and filing a bond for further costs, and presenting to the Justice a bill of exceptions setting forth whatever is essential to a full understanding of the case, within ten days from the filing of the decision, or thereafter at any time before the final adjournment of the term.

E. In appeals in equity the time for perfecting an appeal is to be computed from the date of filing the decree. Decrees must be prepared by counsel prevailing, shown to opposing counsel, and presented to the Court for signature within five days from the filing or rendering of the decision, but the time may be extended for cause.

F. Whenever a bond is required in the above rules, cash to the full amount of the penalty of the bond may be deposited with the Clerk in lieu thereof.

IX.

Whenever amendments in the pleadings are allowed, the opposing party shall not thereby be entitled as of right to a continuance. All pleadings may be amended at any time before the return day by filing the amended plea and furnishing the adverse party with a copy thereof.

X.

If a demurrer by the defendant be overruled, the defendant may answer over on terms.

Special pleas may be filed together with the plea of general issue. Replications may also be filed.

XI.

In personal actions, the Statute of Limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff's claim, any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency, unless he shall, on filing his answer, give notice at the foot thereof of his intention to rely upon all or any of such defenses.

XII.

No case in Banco shall be heard until counsel shall have presented to the Court a brief abstract of the points and authorities relied on.

XIII.

In actions for goods sold and delivered, money had and received, money lent or money paid, the plaintiff's declaration shall be accompanied with a bill of particulars, a copy whereof shall be served with the copy of the declaration.

XIV.

Costs shall follow judgment in all original actions in this Court.

XV.

Attorneys shall be liable for costs of Court incurred by their respective clients.

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XVI.

- Whenever the statute cost is twelve and a half cents, only ten cents shall be taxed.

XVII.

Marshal's or Sheriff's mileage shall only be allowed on the distance to the party served one way. Any party taking out a process to be served on another island, may request the Marshal or Sheriff to mail the same to the Sheriff of such island, the person requesting taking the risk of safe delivery by mail, and in such case only the Sheriff's mileage shall be allowed. But Marshal's or Sheriff's fees shall be paid before process is served.

XVIII.

In civil cases, witnesses' mileage and fees for attendance shall be paid before process is issued to compel their attendance.

XIX.

RESCINDED.

XX.

No process shall issue on the petition of the next friend of any minor not having a guardian, except by leave of Court, or of a Justice thereof.

XXI.

Except by leave of Court in cases where the parties agree, no cause shall go on the Calendar which is not returnable on or before the first day of the term, but shall be in order for the next succeeding term.

XXII.

The Calendar shall be made up as follows, viz.: Cases for native jury, for mixed jury, for foreign jury, cases in banco, divorces, each being entered under its appropriate head in the order in which the process is returnable, the appeals perfected, and cases in banco filed, the cases being numbered through the Calendar. Crown cases will be given preference, and will be

called in their order. Should the prosecution not be ready to proceed with any case, the case next on the Calendar, whether civil or criminal, will be called.

XXIII.

RESCINDED.

XXIV.

RESCINDED.

XXV.

No challenge to the array shall be allowed except for favor, prejudice or partiality shown by any officer in selecting, drawing or impanelling the jury. Challenges to any juror may be made for like reasons, or for favor, prejudice or partiality or incompetency of the juror. In criminal cases the Crown shall first challenge for cause, and the defendant shall not be required to challenge peremptorily until he has exhausted his challenge for cause, and the panel is filled. On each peremptory challenge the vacancy shall first be filled, and the challenges then proceed.

XXVI.

RESCINDED.

XXVII.

No jurat shall be held sufficient in Equity or Admiralty which merely declares that a statement "is true as the affiant believes," or "to the best of his knowledge and belief;" but all facts shall be verified absolutely, and matter of belief and recollection by a separate clause.

XXVIII.

Applicants for admission to the Bar shall file certificates of good character, and of having pursued the study of law for at least one year with some practitioner at this Bar, or at the Bar of the higher courts of another country, or at some regular law school, or a certificate of admission to the Bar of the higher courts of another country.

Examinations for licenses to practice in the Police and District Courts shall be had at the October and April Terms of the Supreme Court at Honolulu, and at no other time or place. Applications for admission, accompanied by certificates of good moral character, must be filed on or before the first day of the above terms.

XXIX.

RESCINDED.

XXX.

The Clerks of the Supreme Court shall keep the following Books of Record, properly indexed :

Admiralty,
Criminal,
Divorce,
Equity,
Law,
Probate ;

and also a Daily Register.

A Clerk shall attend all hearings at Chambers or the Term, and record on legal cap paper a concise statement of all proceedings had, together with such testimony as the Court shall direct to be recorded, which record shall be filed with the papers in the case : and there shall subsequently be entered in the appropriate Record Book a brief summary of the pleadings and proceedings in each case, followed by the Judgment or Decree of the Court, which shall be entered in full.

XXXI.

The Deputy Clerks of the Supreme Court may perform any duty required of the Clerk, subject to the approval of the Court.

XXXII.

The Clerk's office of the Supreme Court shall be open, and the Clerks in attendance, from nine o'clock to four o'clock each business day, except on Saturday, when the office will close at noon.

XXXIII.

RESCINDED.

XXXIV.

No person holding a full commission as District Justice shall appear as an attorney in any other District or Police Court in any criminal case.

XXXV.

In Equity cases the return day, unless expressly so agreed by counsel, shall not be regarded as the day for hearing; but the day for hearing shall, unless counsel expressly agree upon it, be then assigned by the Court.

XXXVI.

IN PROBATE.

A. All Wills admitted to Probate shall be recorded in a Record Book, which shall be indexed, and shall also contain a concise memorandum of Probate proceedings, orders and decrees. The evidence shall be recorded and kept on file.

B. Administrators and, unless exempted by Will, Executors, shall be required to file a bond with surety before letters are issued; also to file in thirty days from appointment a sworn inventory; and in eight months from appointment to file an account of their receipts and expenditures, unless the circumstances of the case require different orders.

C. No appointment of an Administrator or Executor, except of a temporary Administrator, no allowance of accounts, discharge of Administrator or order of final distribution shall be made except on sufficient notice of the matter to be heard, and of the time and place of hearing.

Of hearings on petitions for discharge and final distribution, notice shall be given by publication in such newspaper or newspapers, as the Court may order, for at least three successive weeks, the last publication to be not less than two weeks previous to the time therein appointed for the hearing. Notice of hearings on the appointment of Executors or Administrators shall be given

by publication in such newspaper or newspapers as the Court may order for three successive weeks ; and on other islands than Oahu, the last publication shall be not less than one week previous to the hearing.

D. No final order discharging an Executor or Administrator shall be issued until the filing of the receipt of the share of personal property of each devisee or heir, signed by him or his legal representatives.

XXXVII.

BANKRUPTCY.

A. The bankrupt shall attend at all hearings for the proof of debts.

B. A bankrupt, on applying for his discharge, shall give notice to the assignee of his estate of such application. The assignee shall report to the Court, as to the matter which may have come to his knowledge which would prevent such discharge being granted, and generally as to the conduct of the bankrupt, and as to the position of his estate, and such matters as he may deem proper to bring to the notice of the Court.

C. The costs of the petitioning debtors or creditors shall be taxed according to the scale allowed to attorneys by Section 1280 of the Civil Code.

D. Blanks for all proceedings in bankruptcy can be obtained at the Clerk's Office.

E. For swearing and filing proof of debt, including blank, a fee of twenty-five cents will be paid by the party making the proof.

XXXVIII.

SUPREME COURT AT CHAMBERS.

A. The several Justices will sit in Chambers, in rotation, for one week each, commencing on Monday, the 31st day of January, 1887.

B. All bills in equity shall be directed to the Chief Justice and Chancellor, and must be filed with the Clerk, who will, if no restraining process is prayed, issue a summons, returnable before

the Justice who shall be sitting in Chambers at the expiration of the time limited by such summons for answering, which Justice shall hear the case. Having taken jurisdiction the said Justice will hear it to its conclusion, although continuances may carry it into weeks occupied by other Justices.

C. The time for answering shall be ten days after service, if the defendant resides on the Island of Oahu, and twenty days after service if made on either of the other Islands.

D. If a preliminary injunction, or any other restraining process is asked for, the application shall be made to the Justice sitting in Chambers at the time.

E. In all other matters which require an order to be made by a Justice, the application must be made to the Justice sitting in Chambers at the time.

F. In the event of the Justice in rotation being absent from any cause, another Justice will sit for him, and all matters returnable during such absence shall be heard by such other Justice.

XXXIX.

APPEALS FROM POLICE AND DISTRICT COURTS.

A. No appeal in any case, civil or criminal, to the Supreme or Circuit Courts, which has been filed in the Appellate Court, may be withdrawn without leave of the Court, and upon such terms as to costs and witness' fees as the Court may order.

B. Police and District Justices are hereby directed in all cases, whether civil or criminal, in which appeals have been taken from them to the Circuit Judge or Justice of Supreme Court, to the Circuit Court or Supreme Court, to forward without delay (after appeal perfected) to the Judge or Justice or Clerk of the Appellate Court, as the case may require, the *certificate of appeal*, which should state the nature of the action, the decision made, whether the appeal is to a jury, a Judge at Chambers, or to the Court in Banco on points of law, and in the latter case the points should be distinctly stated.

They will also send up the original summons or warrant, and all the vouchers and exhibits filed, together with a transcript of the testimony, which, in civil cases, may be made brief.

They will also send to the Appellate Court *all* money paid in by either party to the suit, with a clear and itemized statement of the party by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what has been kept back.

Bonds for costs should be made to the Clerk of the Appellate Court, and may be received by the Police and District Justices, to be forwarded with the other papers; if, however, appellants desire to send their costs bonds to the Clerk, they may do so.

If the case be one of commitment for trial, such Justices will send the papers to the office of the Attorney-General, as required by Section 918 of the Civil Code.

XL.

Copies of all pleadings subsequent to the petition shall be served by the party filing the same upon the opposite party or his attorney.

XLI.

Neither party to a suit shall change his attorney of record without leave of the Court or a Justice thereof.

NOTE.

Certain rule numbers are marked **RESCINDED**, it being desirable to preserve the old numbers for old rules to which reference has been made in opinions of the Court.



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CASES DECIDED
BY THE
SUPREME COURT
OF THE
HAWAIIAN ISLANDS,
IN BANCO.

MAIKAI *vs.* A. HASTINGS & CO.

APPEAL FROM COMMISSIONERS OF WATER RIGHTS.

JULY TERM, 1888.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

A Judgment of Water Commissioners, signed by only one of them,
is void.

OPINION OF THE COURT BY JUDD, C. J.

THIS is an appeal from a decision of Water Rights in the District of Waianae, Oahu.

The Commissioners have not complied with the law which requires them to send up a copy of their judgment with the evidence adduced, and the Court has been obliged to resort to the original book in which their proceedings are kept. It appears from this book that the judgment is not signed by the Commissioners, but by only one of them.

We consider that this is a void judgment and the proceedings are vacated. The plaintiff must pay the costs, but the Commis-

JULY, 1883.

sioners must hear the case anew without further charge for their services.

J. A. Nahaku, for plaintiff.

F. M. Hatch and *C. Brown*, for defendants.

Honolulu, July 3, 1883.

Y. ALAU *vs.* W. C. PARKE.

EXCEPTIONS FROM RULING OF AUSTIN, J.

JULY TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

In an action for false imprisonment the Court refused defendant's request to find on the question of probable cause, but left the same to the Jury : *held* to be error, and a new trial ordered. *Ah Cheu vs. Wong Kuai*, 3 Hawaiian, 85, followed.

OPINION OF THE COURT BY AUSTIN, J.

THIS case was an action for false imprisonment tried by a jury before Mr. Justice Austin at the April term of the Court. The judgment rendered was in favor of plaintiff.

The Court, upon the defendant's request to find upon the facts whether there was probable cause for the arrest, which was proved, refused so to find, but submitted that question to the jury.

Upon the authority of *Ah Cheu vs. Wong Kuai*, 3d Hawaiian Reports, p. 85, which escaped the attention of the Court below, we think this was error, and the judgment is therefore reversed and a new trial ordered.

W. R. Castle, for plaintiff.

E. Preston, for defendant.

Honolulu, July 6, 1883.

KILAUEA SUGAR CO. *vs.* R. A. MACFIE, JR.

EQUITY APPEAL FROM THE DECISION OF JUDD, CHANCELLOR.

JULY TERM, 1888.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

A manager of a sugar plantation owned by a corporation is not an officer of the corporation, and *Quo Warranto* does not lie to remove him : nor would it afford the relief desired, even if he were an officer.

Equity has jurisdiction by injunction to restrain assertion of doubtful rights in a manner productive of irreparable damage, as of a manager of a plantation interfering with the management after his removal. Decision of the Chancellor affirmed.

The Opinion of the Chancellor, appealed from, was as follows :

OPINION OF JUDD, CHANCELLOR.

THIS is a Bill in Equity alleging, in substance, that the plaintiff, a corporation, duly incorporated under the laws of this Kingdom, owns a sugar plantation on the island of Kauai ; that respondent had been manager of the said plantation, but was on the 1st day of May, 1883, removed from this position by the President of the corporation, in accordance with a vote of the directors and of the stockholders of said corporation, at a meeting at which respondent was present, the whole number of shares in the corporation being 300, and the holders of 225½ shares voting in favor of this action.

That one Louis Alborn was thereupon duly appointed as manager, and proceeded to Kauai and requested the respondent to make over to him the management of said plantation pursuant to said order of removal, etc., but this the respondent refused to do, and he still refuses to resign or transfer to said Alborn the management of the plantation ; that by reason of said acts and doings on the part of the respondent, the plaintiff corporation is liable to suffer irreparable damage and injury in respect of the crops and labor and otherwise concerning the plantation, and they have no adequate relief therefor except in a Court of Equity by an injunction ordering and enjoining him (the respondent) not to interfere in any way with the management or charge or control of said plant-

ation, and to transfer and deliver the management and all things pertaining, to said Alborn, etc.: that the respondent is only interested in the plantation as mortgagor of 74½ shares to H. Hackfeld & Co., etc., etc. The bill prays for an injunction as above, and that after answers and proofs the injunction be made perpetual.

At the hearing the respondent demurred generally, alleging for cause that the bill does not disclose any equitable jurisdiction; that this case is apparently for the purpose of trying a question of title to an office, and the proper remedy is by *quo warranto*; that equity has no jurisdiction over questions of title.

I am referred to 2 *High on Injunctions* §1210, where the author says, "Nor will a Court of Equity, at the suit of stock-holders of a corporation, restrain its officers from the exercise of their functions, since such restraint would be equivalent to removal from office, and over such a subject equity has no jurisdiction."

Also, *Id.* §1256: "Where the only point is the legal question of the authority of municipal officers to perform a particular duty and no irreparable injury is shown to result from their assertions of authority, an injunction will be denied, and the parties aggrieved will be left to determine the questions of authority by proceedings in *quo warranto*." Citing *Brown vs. Reding*, 50 N. H. 336. Also, *Id.* §1235, "It is also to be observed that Courts of Equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law in the nature of a *quo warranto*. Citing *Mickles vs. Rochester City Bank*, 11 Paige, 118. *Hartt vs. Harey*, 32 Barb. 55.

In this latter case the Court says, "It seems to me that upon these authorities it is impossible to hold that there is any jurisdiction in a court of equity to determine the right to an office, unless the jurisdiction attaches by reason of some considerations in the particular case, by reason of which the court of law cannot furnish adequate relief."

Our own Statute, Chap. XXXIX. of the Acts of 1876, defines the writ of *quo warranto* to be "an order * * directed to a

person who claims or usurps an office in a corporation, inquiring by what authority he claims to hold such office."

These authorities seem to lay down the law correctly and I do not dispute their soundness. But is the question raised by the bill one of title to an office in a corporation? I think not. A manager of the sugar plantation owned by the corporation is not in any sense an officer of the corporation. He is not alleged to be so in the bill.

"An action in the nature of *quo warranto* does not lie against the secretary and treasurer of a railroad company, who is a mere servant, holding at the will of the directors."

People vs. Hills, 1 Lansing, 202.

The court there say "The only effect of a judgment against the defendant would be his removal from office; but such a judgment would be nugatory, for the directors might immediately reinstate him." Citing *Commonwealth vs. Dearborn*, 15 Mass., 125, and *The King vs. Corp. of the Bedford Level*, 6 East, 556.

I fail to see how the writ of *quo warranto* could be made to apply or would afford the relief desired, even if it be conceded that the managership of the plantation is an office in the corporation and that respondent is holding or usurping it without authority.

The judgment which the court would pronounce, if in favor of the applicant, would be of *ouster*. This merely settles the title to the office, and the court would declare him "not qualified to fill the office of which he performs the duties, and forbid him to perform them any longer." Chap. XXXIX Laws of 1876, §§40, 41. It must be borne in mind that the demurrer assumes that the *facts* alleged in the bill (though not its inferences) are true, even though raising jurisdictional questions.

Now the bill alleges that respondent has been removed from the position as manager by the president of the corporation, pursuant to a resolution of the directors and share-holders, and that by refusing to surrender the management and control of the plantation, the property of the corporation, "great and irreparable injury in respect to the labor and crops and otherwise concerning the plantation may result." In deciding this demurrer these allegations must be considered to be true.

It will be noticed that in many of the citations from authorities above made, the courts qualify the statement that a court of

equity cannot try questions of title to office by expressions similar to the following, "unless the jurisdiction attaches by reason of some consideration in the particular case, by reason of which the court of law cannot afford adequate relief." 32 Barb. 55 and 2 High Inj. §1256.

After an enumeration of the various cases in which the remedy of injunction may be applied, given in Hilliard on Injunctions, p. 8, the author says, "These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the *writ of injunction*." "The extent to which the jurisdiction may be carried is not marked out by any adjudged case, and from the nature of things it must forever remain undefined."

Lord Redesdale, in his summary of the general objects of equity jurisdiction, gives as one of them: "(6.) To restrain the assertion of doubtful rights in a manner productive of irreparable damage." Story's Equity Pl. §472. The object sought for in the bill before me is analagous.

The acts of a removed manager of a sugar plantation in declining to surrender full control, or by interfering with the management, might be considered as a continuing trespass, and if this be coupled with an allegation that great and irreparable damage is likely to be occasioned by such acts of respondent, there is no doubt in my mind of the jurisdiction of a court in equity to restrain them.

The Bill substantially covers this ground. I therefore overrule the demurrer; respondent may answer over in ten days.

Smith & Thurston, for plaintiff.

F. M. Hatch, for respondent.

Honolulu, May 28, 1883.

OPINION OF THE APPELLATE COURT BY AUSTIN, J.

This case comes here on appeal from the decision of the Chancellor overruling the demurrer of the defendant to the plaintiff's bill. The demurrer avers that the bill is not sufficient in law.

In his argument, the defendant's counsel claims that the plaintiff is not entitled to an injunction, which is the relief sought in the complaint; that his remedy is at law by *quo warranto* to try the defendant's title to the office of manager of the plaintiff's plantation. And, further, that even if the remedy is not by *quo warranto*, the allegations of injury as stated in the bill are insufficient upon which to grant an injunction.

Upon the authorities cited by the Chancellor in his opinion, we think the remedy in the case for the plaintiff is not at law by *quo warranto*.

The manager of a plantation owned by a corporation is in no sense an officer of the corporation. He is only an employee and servant of the corporation. As such he can be discharged at will by the plaintiff, even though his agreed term of service had not expired, subject to his right to claim damages at law for a wrongful discharge. After such a discharge, he has no right to attempt to perform the duties of manager, or to prevent a new appointee from performing such duties. He has no possible right or title to an office of the corporation.

We also think the allegations as to the nature of the injuries likely to result from the acts of defendant are sufficient to authorize an injunction.

The defendant's counsel says that the defendant is not charged with waste or with refusing to carry on the work of the plantation.

This is unnecessary, and would be inconsistent with the other allegations. The allegation is that the defendant insists upon carrying on the work of the plantation in his own way, and contrary to the wishes of the plaintiff. That being a minor part-owner of the stock of the corporation, he insists upon personally managing it after he is discharged, and that he stated, when asked to give up the management, that he would not, and that he would make H. Hackfeld & Co., the agents and principal creditors of the plaintiff, and also of the defendant, all the trouble

he could. That by his refusal to give up the control of the plantation, and because of all the matters alleged, there is great danger that the defendant will work irreparable injury to the plantation in its crops and labor and otherwise, unless restrained.

The allegations show that the defendant is the owner of about one-fourth of the plaintiff's stock, subject to a mortgage to said agents of over \$100,000, which is largely more than its par value. The threats to make H. Hackfeld & Co. all the trouble he could, show a reckless disregard of the plaintiff's interests, as well as his own.

The duties of the manager of a sugar plantation are well known. He has charge of all the laborers and makes the contracts with them, and directs all the operations of planting, harvesting and grinding the cane. His acts, if negligent, or for any reason hostile to the plaintiff's interests, might surely work irreparable injury. The defendant insists upon retaining his place as manager, and we think the plaintiff, unless he is restrained, has reason to fear irreparable injury.

We think the allegations are sufficiently specific and complete, and make a plain case for an injunction.

Smith & Thurston, for plaintiff

F. M. Hatch, for defendant.

Honolulu, July 27, 1883.

J. F. HACKFELD *et al.*, *vs.* ING CHOI *et al.*

APPEAL FROM THE DECISION OF JUDD, CHANCELLOR.

JULY TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

In the absence of the Clerk of the Court from his office, a paper for filing should be taken to a Deputy Clerk, or left on the Clerk's desk, and his attention called to it; if lost, meanwhile, it is at the risk of the person leaving it.

The Court allows an appeal to be heard, in view of exceptional circumstances, although it was not perfected seasonably.

OPINION OF THE COURT BY JUDD, C. J.

This is a bill in Equity. The judgment of the Chancellor was filed May 2, 1883, and the case was put on the calendar to be heard on appeal by the Court in Banco. The counsel for the plaintiff moves to dismiss the appeal on the ground that it was not perfected seasonably. The affidavit of counsel for the defendant sets forth that on the 5th of May he filed a notice of appeal, and on the 10th day of May he filed a bond to secure the costs to accrue on the appeal, by placing it on the desk of the Chief Clerk, in his absence. The bond was not found by the Clerk until some time in June, when the Clerk was making up the calendar of cases for the July term. The affidavit further sets forth that, within ten days from the date of the decision, the defendant asked the Clerk to make up the costs in the said case, which the Clerk promised to do. The affidavit sets forth that the Clerk (our late respected and much lamented friend, Mr. Barnard, now deceased,) was ill and absent from his office. The costs were finally paid some time in June.

Rule 4 of the Supreme Court requires that appeals from a Justice at Chambers must be taken within ten days from the rendition of the decision, by paying costs accrued, and filing with the Clerk of the Court a bond in the sum of \$50 for costs to accrue, with the notice of appeal.

We think that when a paper is presented for filing and the

JULY, 1883.

Clerk is absent, it should either be taken to the Deputy Clerk, or left on the desk of the Clerk, and his attention should be called to it seasonably, and if lost meanwhile, it is at the risk of the person leaving it. The Court is, however, aware of the embarrassment occasioned to counsel by the sudden attacks of illness to which our late Clerk was subject, and in view of these exceptional circumstances, which may never again occur, we are inclined to excuse the counsel for appellants, and to allow his appeal, and it is so ordered.

R. F. Bickerton, for plaintiffs.

W. R. Castle and *C. Brown*, for defendants.

Honolulu, July 27, 1883.

ESTATE OF PUHAIKALA.

EXCEPTIONS TO RULINGS OF AUSTIN, J., AT TRIAL BY JURY.

JULY TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

In order to sustain a lost will, the jury must be satisfied, from preponderance of evidence, that the will was made and duly executed, and that its contents were substantially and in every essential respect as alleged.

A lost will may be proved by competent secondary evidence; but the execution of a lost instrument need not be proved beyond a reasonable doubt.

Dates need not be proved with exactness.

Neglect of executor to present will for probate during minority of a devisee, should not operate unfavorably to the minor.

OPINION OF THE COURT, BY JUDD, C. J.

This was an application for the proof of a lost will, heard originally by Mr. Justice Austin. The will was by him established and admitted to probate, and the contestants appealed to a jury at the last April Term, and the jury sustained the will.

The issue for the jury to decide was, "whether or not the said Puhai kala did execute a will devising her property in Palama, Honolulu, to Anahiwa, her grand-daughter, the petitioner."

After the evidence for the petitioner was in, the contestants' counsel moved for judgment, on the ground that no case was made to go to the jury, as the testimony for the petitioner was conflicting. This motion being overruled, the contestant now excepts. Upon a review of the testimony, we find there was evidence adduced pertinent to the issue and sufficient to support the verdict.

The counsel for the contestants asked the Court to instruct the jury that, "in order to find a verdict for the plaintiff (the petitioner herein), the jury must be satisfied that the will was dated, made and duly executed, and that the contents were as alleged, without any reasonable doubt; if the petitioner has failed in any of these points, they must find against the will;" which the Court refused, and instead of which charged the jury in a modified form, that in order to find a verdict for the plaintiff (the petitioner herein), the jury must be satisfied that the will was made and duly executed, and that the contents were substantially and in every essential respect as alleged, according to the great preponderance of the evidence, and if the petitioner has failed in any of these points, they must find against the will.

We think that the Judge was right in his charge. As to proof of a lost will, "the proof must restore the entire will, not, perhaps, every letter and word, but all that is important; so that in granting probate the Court will feel assured that it is the probate of the same will which the testator executed." Redfield's Cases, Law of Wills, p. 217.

In *Burton vs. Driggs*, 20 Wallace, 134, Mr. Justice Swayne says: "It is an axiom in the law of evidence that the contents of any written instrument, lost or destroyed, may be proved by competent evidence."

Says Greenleaf (Vol. 1, Sec. 509): "But whether it (the record) be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence,

where the case does not, from its nature, disclose the existence of other and better evidence."

But there is no rule of law requiring the execution of a lost instrument to be proved beyond any reasonable doubt.

The Court further instructed the jury upon the matter of date, that "It was not necessary to prove the date with accuracy or exactness; that dates rested uncertainly in the human memory; that a mistake of a few months or longer in the date would not be fatal to the will, if it was substantially proved." We think this instruction was in accord with the law, and was correct.

"The Court further charged that the infancy of the petitioner was to be considered, with the other facts in the case, upon the question of delay and laches, and that the neglect of Kupahu, the alleged executor, if any, should not injure her rights under the law."

There is certainly nothing in the law to prevent an executor, under a will in favor of a minor, from presenting it to the Court during the minority of the devisee, but the neglect to do so should not operate unfavorably to the minor, nor raise any presumption that the will was never executed.

Having thus disposed of the exceptions, the verdict of the jury in favor of the petitioner must stand, and the will be admitted to probate.

F. M. Hatch, for petitioner.

E. Preston, for contestants.

Honolulu, August 13, 1883.

H. R. H. LILIUOKALANI *et al.* vs. PANG SAM *et al.*

APPEAL FROM COMMISSIONERS OF WATER RIGHTS FOR THE
DISTRICT OF HONOLULU.

JULY TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

The Commissioners of Water Rights for the District of Honolulu having found that a certain dam in the "Kamoiliili" stream, called "Kikiakoi," supplied water to the land of the appellant Pang Sam, and that a former owner of the springs and land had built such dam, and merely changed the location of the irrigating canal, and that the springs and land were still under the same ownership, and having decided upon these facts that the Kikiakoi dam was not entitled to water from said stream; such decision held to be erroneous.

The Commissioners having also decided that the land of the other appellants was entitled to water from the said stream for two hours per day only; such decision held to be erroneous, and both decisions modified.

OPINION OF THE COURT BY JUDD, C. J.

This is an appeal from a decision of the Commissioners of Water Rights for the District of Honolulu, rendered July 9th.

It is an extremely puzzling case. The Commissioners have taken patiently a great deal of testimony, and have come to a carefully considered opinion. Its effect is, however, apparently ruinous to the two appellants J. Moanauli and Pang Sam.

All the steady supply of water in this stream of Kamoiliili comes from the "Kanewai springs," in land the property of the Estate of the late Ruth Keelikolani. This water is divided below the springs, and a part of the water flows in the Kaluaolohe stream and a part in the Kamoiliili stream. About all the kalo and rice culture of Waikiki mauka, waena and kai, is supplied with water from these sources.

It seems to be generally admitted that the plaintiffs and other owners makai are entitled to the water during the day.

The first dam in the Kamoiliili stream is called "Kikiakoi."

It supplies the land held by Pang Sam. This land was previously watered from the Kaluaolohe stream, and this dam was built in 1866 by Kamehameha V, who then owned these Kanewai springs and the Kikiakoi land, and he merely changed the location of the irrigating canal. The springs and the land of Kikiakoi are still under the same ownership.

The Commissioners find these facts to be true, and yet they decide that the Kikiakoi dam is not entitled to water from this stream. We think this is error. The change made in 1866 does not affect the rights of others, and it is not material to the other land owners whether the Kikiakoi land receives its supply of water from the Kaluaolohe or the Kamoiliili stream.

As to Mr. Moanauli, he leases the land of Kullei belonging to the Sumners. It consists of twenty-five acres, mainly kalo land, and is nearly all planted in kalo, the water for which is supplied from the Kamoiliili stream through an ancient watercourse starting at a dam called Waiaka. The Commissioners decided that this land is entitled to water from 4 to 6 p. m. only. This is manifestly insufficient. For even if the stream should be full and the watercourse carry its full body of water, the water runs so sluggishly, owing to the level nature of the ground through which this watercourse is dug, that two hours is not sufficient time in which to allow the water to spread itself out and flow from one patch to the other and supply the land.

One member of the Court visited this land on the 4th of August, and the kalo in nearly every part of the land was dying, showing that no part of it had had sufficient water for some weeks past.

One great difficulty in the case is that all the persons who have rights of irrigation from the Kamoiliili stream are not parties to this case, and though the Commissioners have jurisdiction under the law to make such decisions as shall appear to them "just and equitable," it would be difficult to do justice unless all whose rights are affected are before the Court and subject to its jurisdiction.

There is considerable testimony to the effect that the "Olawai" or a constant small flow (as much as will run in the ditch while the gate of the dam is open) was accustomed to run in the "Wia-aka" ditch during the day to the land of Kullei, and then at

night the whole stream (or as much of it, we presume, as the ditch would carry) was turned into the ditch, and the water ran until the kalo land was filled. The Commissioners found that the right to this "Olowai" was in its inception a permissive one. It may afterwards have become an adverse use, and have been thus used for over twenty years. A good deal of testimony points to this. We were struck with a remark made at the hearing by the counsel for the plaintiffs, that since the adjudication the plaintiffs, and those having water rights makai and using the water by day, had an abundance of water. As this is a season of rather unusual drought, it would indicate that by the force of the decision more water runs makai to the plaintiffs' and others' lands than was accustomed to run there. We think, upon a review of the testimony and an inspection of the *locus in quo*, that the decision of the Commissioners must be modified as follows:

(1.) The dam at Kikiakoi must be allowed to take water from the Kamoilili stream, even if this compels the taking of a correspondingly larger supply of water from the Kanewai springs.

(2.) The Olowai must be allowed to run as heretofore in the Waiaka ditch to Kuilei.

(3.) The use of the water at night must be distributed as follows:

Kikiakoi, 1-6, from 4 to 6 p. m.
 Waiaka, 1-6, from 6 to 8 p. m.
 Ono, 1-6, from 8 to 10 p. m.
 Paakea, 1-4, from 10 to 1 p. m..
 Kamoku 1-4, from 1 to 4 p. m.

In other respects the decision of the Commissioners must stand.

J. L. Kaulukou, for petitioners.

C. Brown and *G. W. Pilipo*, for J. Moanauli.

W. R. Castle, for Pang Sam and Goo Kim.

Honolulu, August 14, 1888.

JULY, 1883.

THE KING vs. HELELIILIL

EXCEPTIONS FROM CIRCUIT COURT, THIRD JUDICIAL CIRCUIT.

JULY TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

In order to sustain a conviction for knowingly uttering a forged check, the instrument need not be so made that if genuine it would be valid.

A check informally and awkwardly drawn held to be valid, when coupled with the statement of defendant, the endorser, that it was genuine.

The Court will take judicial notice of the condition of communities on the different islands, and their modes of transacting business.

After both parties have rested, it is in the discretion of the Court to allow the prosecution to put in evidence inadvertently omitted.

OPINION OF THE COURT BY AUSTIN, J.

This case comes here on exceptions, for errors of law.

The defendant, on trial before Mr. Justice Austin, at the Third Judicial Circuit Court, in May, 1883, was convicted of uttering a false or forged draft, check or order, knowing it to be false or forged.

The defendant claims, first, that the paper, if uttered, did not carry on its face the semblance of that for which it was counterfeited, and that it was obviously invalid, void and of no effect, and so the defendant cannot be convicted because of the provisions of subdivision seven of the statute of forgery.

The paper in question is as follows:

“Banking House of Bishop & Co.”

Honolulu, H. I.,

1883.

bearer

Pay to

January 18

or order

Dollars.

\$55.00.

MR. GREENN.

It is endorsed in writing “L. Hall.”

The figure "3" and the words and figures "January 13," "55.00" and "Mr. Green" are written, and the word "bearer" seems to be printed by stamp in red.

All the rest of the paper is printed, and the whole appears substantially as quoted above.

The defendant represented it to be a good plantation draft for fifty-five dollars, and it was accepted as such and endorsed by the defendant, as stated, with what he said was his name in English.

The paper thus presented and passed was not subject to the objection referred to in subdivision 7 (seven).

That subdivision (see Chap. 30, Penal Code) says that "to constitute forgery, it is not essential that the forged instrument should be so made that if genuine it would be valid."

This paper was passed to a Chinese storekeeper at Kohala, on Hawaii, who swore that he did not understand English. The Court will take judicial notice of the condition of communities on the different islands. As a matter of fact, it is well known that many Chinese and others who do not understand English are engaged throughout the islands in commercial business, in a small way, to whom drafts to be cashed are frequently presented.

This fact is proper to be considered in examining the case, and although such a paper might not be taken by a good business man understanding English, it might well be taken as it was in this case.

We think the paper uttered, though informally and awkwardly drawn, would, if genuine, have been a valid check which could have been enforced against the drawer, and against Bishop & Co., if the drawer had funds in their hands.

It was addressed to Bishop & Co. It was dated, though irregularly. But no date was necessary to its validity. It was not a time check, but was payable at sight. "If the date should become necessary to be inquired into, it may be ascertained by evidence, and the date will be computed from the day it was actually made or issued."

See Story on Bills of Exchange, Sec. 37 and notes.

The check was payable to bearer, and no payee was necessary to be named. "A blank may be left for the name, and any *bona fide* holder may insert his name as payee *ab initio*."

See Story on Bills, Sec. 54.

"If the Bill be made payable to ——— or order, any *bona fide* holder may fill up the blank with his own name, and he will be deemed to have been such from the origin of the bill."

Id., Sec. 56.

The defendant, who claimed to be the *bona fide* holder in this case, endorsed the check. For the purpose of its validity, this was as though he had also written his name in the body as payee.

The place where the check is drawn need not be stated on its face.

See *Id.*, Sec. 40.

The amount is expressed in figures only. This has been held sufficient, though suspicious.

See Parsons on Notes and Bills, pp. 28, 29, 26, 27, Vol. I.

But it was accompanied by a statement of the defendant that he was a *bona fide* holder of the check. If the bill be signed in blank and be afterwards filled up by a person who is authorized to do so, it will be obligatory upon the parties to it.

See Story on Bills, Sec. 53.

The defendant had authority, if requisite, and if what he said was true, to fill in the amount in writing, and the one to whom he passed the check had a like authority.

See *Id.*, Secs. 53, 54 and 56.

Upon these familiar authorities, we think that the Chinese who took the check was justified in doing so, upon its being declared by the defendant to be genuine. The figures in the margin, with the statement of the defendant that it was a valid draft for fifty-five dollars, was sufficient to allay all suspicions. Any good business man would have been justified in taking it under such circumstances from a person whom he well knew.

See also *The King vs. Kalaluhi*, 3d Haw. 417.

The defendant's counsel further claimed that there was no evidence that the paper was forged.

By comparison of the signature to the paper with the endorsement proved to be made by the defendant, it is apparent that the defendant did not personally sign the name "Mr. Green," and therefore he did not commit actual forgery, though if he directed or adopted it, it may be he could have been convicted of forgery,

but certainly if he uttered it, knowing it to be false or forged, he could be convicted as he was.

We think the evidence that it was forged, and that he knew it to be so, was sufficient. The Chinese who received it said he "passed it to a Chinaman, and it was afterwards returned to him unpaid."

It was passed at Kohala, February 24, 1883, and was represented to be a genuine plantation draft. Proof was made that no such man as Greenn lives or was doing business at Kohala. The defendant had represented that it was a good plantation draft, and there are several plantations at Kohala.

This proof was competent, and tended to show that the draft was false or forged, or that it was fictitious.

The proof was *prima facie* sufficient. If the draft was genuine, the defendant must have known it, and was bound to prove it after that proof by the Crown.

See 8d Greenleaf, Sec. 109.

In addition to this proof, the defendant says, on his cross-examination: "I returned the clothing—two coats, one long and one short, etc. The Chinaman came to me to return them, saying he had not got the money for them. It was December 30, 1882. I got them, and I returned them in February."

The Crown witnesses say that this clothing was got on February 24th, when the forged check was uttered. The defendant denies that he then got the clothing or uttered the order, but admits that he returned the clothing to the Chinaman. The jury disbelieved him as to the time, but believed that he returned the clothes which were got on the forged order. This was strong proof that he knew the order was not genuine.

There was ample evidence to put the defendant to his proof that the draft was genuine.

The defendant's counsel further objected that the proof that there was no such person as Greenn at Kohala, ought not to have been admitted, as it was, after the close of all the evidence, and both parties had rested.

This evidence had been inadvertently omitted by the prosecution, and tended slightly to strengthen the other proof on the

JULY, 1888.

point. The admission of the proof at this stage was in the discretion of the Court, and the discretion was properly exercised.

See *Alexander vs. Byron*, 2 Johnson's Cases; *Mercer vs. Sayre*, 7 Johnson's Reports 306; 7 Greenleaf 181; Graham on New Trials, pp. 259, 260.

It may be that the defendant might also have been convicted of "gross cheat," but he was properly convicted on the indictment.

Judgment affirmed.

E. Preston, for Crown.

Smith & Thurston, for defendant.

Honolulu, September 7, 1888.

THE KING vs. TONG WO.

APPEAL FROM POLICE COURT, HONOLULU.

JULY TERM, 1888.

JUDD, C. J., AUSTIN, J. McCULLY, J., absent.

Where a statute prescribes a penalty for a breach of its provisions, and provides that the Fire Marshal of Honolulu shall prosecute for all violations of such statute, and pay over all fines collected to the Fire Department for its benefit; *held* that an action for breach of the statute should not be in the form of a criminal prosecution.

Actions for penalties are civil actions in form and substance.

The statutory proceeding must be followed strictly and expressly.

OPINION OF THE COURT BY AUSTIN, J.

The defendant was prosecuted and convicted criminally for an alleged breach of statute relating to the Fire Department in the city of Honolulu. The statute prescribes that for a certain act of neglect, the party offending, on conviction, shall forfeit and pay twenty-five dollars for the benefit of the Fire Department.

Section 339 of the Civil Code, as amended by Chapter 45 of the laws of 1880, provides that "it shall be the duty of the Fire Marshal to prosecute all persons guilty of a violation of any of

the provisions of this law before the Police Court of Honolulu, and he shall pay over all fines collected to the Treasurer of the Fire Department, deducting 20 per cent. of such fines for his services."

The question in this case is whether the defendant was liable to be prosecuted criminally for breach of this statute. We think not.

The offense is not an offense at common law. It is not indictable under our statute, and the statute which creates the offense expressly points out how to proceed to collect the sum forfeited, and this method is in the nature of a civil action. No duty in regard to the offense is prescribed to the law officers of the Crown, but all duty about it rests in the Fire Marshal, for the benefit of the Fire Department.

To call such an action a criminal prosecution, and the defendant in it, upon conviction, a criminal, is giving it and the defendant too severe a name, and is not in accordance with the law, as laid down in many books and cases.

Wharton's Criminal Law, pp. 38-39, says:

"If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the command or prohibition of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.

"Wherever a statute creates an offense, and expressly provides a punishment, the statutory proceeding must be followed strictly and expressly."

This quotation, from so high an authority on criminal law, and which refers to several decisions in Europe and America, ought to be sufficient to discharge the defendant in this case.

In *Stearns vs. U. S.*, 2 Paine, 300, which was an action of debt by the United States to recover a penalty, the Court say:

"Actions for penalties being founded upon the implied contract which every person enters into with the State to observe its laws, are civil actions both in form and substance."

In *Atcheson vs. Everett*, Cowper, 382, decided in 1776, which was an action of debt to recover a penalty for bribery, in which also disabilities were provided for, Lord Mansfield says:

"Penal actions were never put under the head of criminal law or crimes. The construction of the statute must be extended by equity to make this a criminal cause. It is as much a civil action as an action for money had and received."

Chapter 51 of the Penal Code and Section 221 of the Civil Code, as amended in 1870, provide for the imprisonment at hard labor of those upon whom fines have been imposed by any Court or Magistrate, and such persons are termed convicts. We cannot believe that the statute we are considering was designed to make possible, for the offense it refers to, so severe and humiliating a punishment as that of imprisonment at hard labor as a convict.

Imprisonment for debt does not exist in this country, and the penalty imposed in such a case as this should be held to be a civil debt, and to be collectable by execution only, like other civil debts.

The following cases are cited by the defendant's counsel, and all tend to sustain our conclusion in the case:

Clarke vs. Powell, 4 Barn. & Ad., 846; *Regina vs. Hicks*, 30 Eng. L. and Eq., 228; *Caswell vs. Allen*, 7 Johns., 63; *Trustees Fire Department vs. Acker*, 26 How. Pr., 263.

The statute referred to is like a police regulation of a city, and the penalties prescribed by such regulations are universally prosecuted for in civil actions in the name of the municipality.

See *Mayor of New York vs. Williams*, 15 N. Y., 502.

The ordinance in that case regulated and provided for the enclosing of hoistways in stores.

On page 505 of this case Judge Paige says: "I think the ordinance may be sustained on the same principles as those on which rest the fire laws prescribing the height, thickness of walls and materials of buildings within the city."

Such an order is analagous to ours, but is more reasonable, for ours allows the Fire Marshal arbitrarily to determine whether acts or omissions are dangerous, and thereupon to give notice to remove or amend.

We hold that the defendant must be discharged.

J. L. Kaulukou, for Crown.

W. R. Castle, for defendant.

Honolulu, September 7, 1888.

E. KEKOA vs. W. C. BORDEN *et al.*

APPEAL FROM POLICE COURT, HĀLO.

JULY TERM, 1888.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

An attorney cannot recover of the husband a fee for his legal services in defending the wife in a criminal suit brought at the instance of the husband against the wife for desertion. Such legal services are not necessities, nor do they come under the head of alimony. Judgment of lower Court affirmed.

OPINION OF THE COURT BY AUSTIN, J.

THE plaintiff seeks to recover directly of Mr. Borden ten dollars for services rendered Mrs. Borden, on her retainer, in two criminal actions against her for desertion of her husband.

It is claimed that such services were necessities furnished to her, and for that reason Mr. Borden is liable.

In suits for necessities recoveries are allowed upon the ground that the wife is the agent of the husband to contract for them. In no enumeration of necessities, which we have seen, are such legal expenses included.

See Sec. 554 and note, Bishop on Marriage and Divorce, vol 1.

If in such a case as this the services sued for are described anywhere, it is under the head of alimony. See 2 Bishop on Marriage and Divorce, Sec. 387.

In all suits for necessities it must appear that those claimed for are suitable, and the good conduct of the wife must also appear.

Where the husband and wife are living apart, the burthen is on the plaintiff to show that the husband has refused his wife proper support at home, or he cannot recover.

“If a wife abandons her husband without justifiable cause or commits adultery for which he turns her away, or voluntarily lives apart from him in adultery, or otherwise dwells separate from him without his consent or fault, the law casts on him no duty even to supply her with necessities.”

See Sec. 573, vol 1, Bishop on Marriage and Divorce.

This is the law almost universally.

Cases from Indiana and New Hampshire are cited by plaintiff's counsel, where recoveries by attorneys were had directly against the husband for legal services to the wife. Only the case from the New Hampshire reports is accessible to us, and we have examined it. See *Morris vs. Palmer*, 39 N. H. 123.

It was a case where it was shown that it was necessary for the safety of a wife to enter a complaint against her husband for a breach of the peace, and it was held that her attorney might recover the legal costs of the proceedings entered against her husband on that complaint by statute, which were left unpaid by him, and for which she as complainant would be liable.

This is a special case, and the court allows costs to the attorney which were entered against the husband by statute. The court exercises a discretion as to what should be allowed, and it is in a case directly brought for the protection of wives' personal safety and where the husband was found guilty. The same case declares that in actions for divorce under the New Hampshire statutes no such recovery could be had.

In the case at bar, the very actions brought against the wife were for her desertion, and at that time she must have been living separate from her husband. To recover in this case, if there could be a recovery, the plaintiff was obliged to show that she was properly separate from her husband owing to his misconduct, and in that case, under our law she would be entitled to sue for a divorce or separation, in which action the court in its discretion might allow alimony for legal expenses and support.

The plaintiff failed to show any proper separation or any misconduct of the husband, and cannot recover. Had this been shown, we think there could have been no recovery under our law, and that there ought not to be, except under some special statute allowing it.

To allow a suit on a *quantum meruit* in such a case, would be a dangerous rule, leading to much petty litigation.

Application for allowance of legal fees and the amount of them ought to be addressed to the discretion of the court in an action for divorce or separation. To allow a court not of record to exercise such a discretion, would be unprecedented and unsafe.

In Massachusetts it was held, in *Shannon vs. Shannon*, 2 Gray, 285, that no allowance of alimony for expenses could be made without a special statute, and a statute was thereafter passed authorizing the court to make an order for such expenses.

In New York, in actions between husband and wife for divorce or separation, allowance for attorneys' expenses to the wife are made in the discretion of the court as to amount, and in many cases where actual or probable misconduct of the wife appears, are entirely denied. In no case in that State can a recovery be had, as asked here, by the attorney, against the husband.

See Barb. Ch. Pr. pp. 265 to 268, and notes.

And we are of opinion that no such action can be maintained in this country.

The judgment of the lower court is affirmed, with costs.

Smith & Thurston, for plaintiff.

W. R. Castle, for defendant.

Honolulu, Sept. 7, 1883.

KAPOOHIWA vs. KALUAAHA.

EXCEPTIONS FROM CIRCUIT COURT, SECOND JUDICIAL CIRCUIT.

OCTOBER TERM, 1883.

JUDD, C. J., and AUSTIN, J. McCULLY, J., absent.

The Court declines to disturb a verdict where the evidence before the jury was sufficient to sustain it.

OPINION OF THE COURT BY AUSTIN, J.

The plaintiff moves for a new trial, on the ground that the verdict is against the weight of evidence.

The plaintiff's counsel cites *Wait vs. McNeill*, 7 Mass. 261, and *Harding vs. Brooks*, 5 Pick. 244, as establishing a doctrine that "the jury are not at liberty to disregard the testimony of a witness of fair fame whose testimony is unimpeached." If to these

words quoted had been added the words "and uncontradicted," the whole, as so amended, would have correctly expressed the doctrine as shown by those cases. But in each of those cases, although there were only circumstances to contradict positive testimony of an unimpeached witness against the verdict rendered, the verdict was sustained.

In the case at bar, the plaintiff's witness, Nakaleka, swears to an admission by defendant that \$35 had been paid by his wife to plaintiff on the contract for sale of taro. This is contradicted by the defendant, and also Hoopii, his wife, swears that she never paid plaintiff any sum on that contract, but loaned him \$35. The rule referred to does not apply to such a case.

The plaintiff shows that the contract of sale was made in December, 1879, and the payment on account of it was made in May, 1880. The defendant shows, however, that the verbal contract was made in January, 1879, and rescinded three months after, and that he remained near plaintiff till December 28, 1879, who never asked for payment up to that time, and then defendant went to Lahaina and remained a year. If defendant is right, as seems probable, as to the time of the contract, the plaintiff waited a long time before asking any pay.

On looking at all the testimony, although we think the verdict might well have been the other way, we do not think it ought to be disturbed.

W. C. Jones, for plaintiff.

J. W. Kalua, for defendant.

Honolulu, November 19, 1888.

W. R. CASTLE, S. B. DOLE and W. O. SMITH vs. JOHN M. KAPENA, Minister of Finance.

APPEAL FROM DECISION OF THE CHIEF JUSTICE GRANTING A WRIT OF MANDAMUS.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Citizens and taxpayers may bring mandamus against a public officer. Mandamus lies against a Cabinet Minister, to compel the performance of purely ministerial duties.

Under the Loan Act of 1882, which prescribes that Government bonds, payable in United States gold or its equivalent, may be issued at not less than par, it is illegal to issue the bonds for Hawaiian silver half-dollars of less intrinsic value than their face value in United States gold coin.

Injunction, not mandamus, is the proper remedy to prevent a public officer from doing a contemplated illegal act, and decision of the Chief Justice reversed on this ground.

THE petition for a writ of mandamus was heard at Chambers, before Chief Justice Judd, who denied a motion to quash, and granted the writ as prayed for. Defendant appealed to the full Court. The facts are stated in the opinions of the Chief Justice and of the Appellate Court.

The decision of the Chief Justice, appealed from, was as follows:

OPINION OF JUDD, C. J., ON THE MOTION TO QUASH THE WRIT.

I am of the opinion that the petitioners, as citizens and taxpayers, have the right to sue out this writ. They have, as taxpayers, the right to endeavor to prevent a public officer from doing what is an injury to the public good. There are authorities on both sides of the question, but the current seems to be in favor of the right, and especially the case of *Crampton vs. Zabriskie*, 101 U. S., 609. This is a case decided in 1879 by the Supreme Court of the United States, and Mr. Justice Field, for the Court, says: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent the illegal creation of a debt which they, in common with other property hold-

ers of the county, may otherwise be compelled to pay, there is at this day no serious question."

To deny this right to a taxpayer would be to say that there is no remedy and no way by which a Minister of the Crown can be prevented from doing an illegal act. Impeachment is too shadowy and uncertain to be thought of as an adequate remedy. If only the Attorney-General can promote such a matter, the answer is that there has been no Attorney-General since May last, and it would be idle to expect an Attorney-General, who is one of the Cabinet, to commence proceedings against his own colleague.

A Minister is responsible to the King for his acts, and he is also responsible to the people for the faithful discharge of his duties. The respondent's motion to quash, which is more properly a demurrer, is overruled.

DECISION OF THE CHIEF JUSTICE ON THE MERITS.

Having given this matter considerable study and attention, and having arrived at a clear and decided opinion upon the question involved, I give my decision now, knowing also that delay would be injurious to the respondent.

I remark here that the petitioners are not amenable to criticism for having brought this action so late. They could have no standing in Court until the act complained of was about to be committed, and if proceedings had been commenced months ago it could be well answered that the application was premature, and the respondent was not about to act in the manner alleged. Moreover, if the act complained of is illegal at all, it was so at the inception and continues so throughout, and it loses none of its illegality by lapse of time.

I remark here that the ability of the Government to borrow money under the Loan Act of 1882 does not affect the vitality or existence of the Government. The authority was given by this act to borrow money for certain specific purposes named in the Act, and by Sec. 3 "no part of the money (thus raised) shall, on any pretence, be paid, used or applied, directly or indirectly, either temporarily or otherwise, to or for any public use or purpose other than the purposes respectively to which the same is hereby directed to be applied."

I presume the Legislature felt that the ordinary resources of the Government would be sufficient for its ordinary expenditures, and so have not authorized the borrowing of money for its ordinary expenditures.

So my decision in this case cannot affect the life or credit of the Government.

Whether the bonds of the Government have or have not been difficult of sale is foreign to this issue. If they have not been eagerly sought for, possibly it is because the interest, being only 6 per cent., is too low, being 3 per cent. lower than the legal rate of interest.

The authority of the Minister of Finance in the premises is to be found within the four corners of this Act.

Section 1 authorizes the Minister of Finance, under the direction of the King in Cabinet Council, to borrow on the credit of the Hawaiian Government, during a period of three years, sums of money not exceeding two million dollars, and the bonds to be issued therefor are (1st) to be issued *at not less than par*; (2d) they are to bear interest not exceeding 6 per cent.; (3d) they are to be exempt from Government taxes; (4th) they are to be redeemable in not less than five nor more than twenty-five years, and (5th) they are payable, principal and interest, in *United States gold coin or its equivalent*. The bonds must be issued in exact compliance with the law. They must be issued, says the Act, at not less than par. What is par? All the lexicographers say that par is "exact equivalence, without discount or premium," that is, there must be received for these bonds the exact equivalent of the sum secured to be paid by them. They are to be paid in *United States gold coin or its equivalent*, and this must therefore be received for them.

If a promissory note calls for payment of £500 sterling, the par value would be £500 sterling and nothing less. Now, if the Minister of Finance proposes to dispose of these bonds for anything less than their face in United States gold coin or its equivalent, it is a violation of the law. It matters not if the silver half dollars which the respondent proposes to take for the bonds be current as money in this realm. The law says most distinctly that the bonds must not be sold for less than par, and as the silver

half dollars are far less in intrinsic value than their face value in United States gold coin, to sell the bonds thus is selling them for less than par.

The law of this Kingdom makes United States gold the standard of value and legal tender. This law must be administered by the Court, even if the community and the Government by common consent ignore its existence. No law is a dead letter to the Court. I may here say that the Act of 1880 providing for a National Coinage, authorizes the Minister of Finance "to purchase gold and silver bullion *with any moneys which may from time to time be in the Treasury*, and to cause to be coined therefrom gold and silver coins" of equal weight and fineness with United States gold and silver coins of the same denominations. That is, foreign coin already in circulation might thus be changed into Hawaiian coin, and this the Legislature thought would not probably disturb the currency very seriously. Silver is a commodity fluctuating in value, and it has been declining in value for some years, and the standard half dollar of the United States is, by the latest quotations, not worth in United States gold much more than forty cents. Being of the opinion that the bonds are proposed to be issued by the respondent for less than par, I grant the writ of mandamus.

I ought to say further that the 70th Article of the Constitution requires the Supreme Court to give its opinion to the King and the Cabinet "upon important questions of law, and upon solemn occasions." And the Justices of the Supreme Court are always ready to give their opinions to the Government when important steps are contemplated. In this instance the opinion of the Court was not asked.

Honolulu, December 14, 1883.

OPINION OF THE FULL COURT BY McCULLY, J.

The petitioners set forth that they are citizens and taxpayers of the Kingdom; that they are informed and believe that the respondent, in his official capacity, has prepared and is now about to issue bonds to the amount of one hundred and thirty thousand dollars, purporting to be pursuant to the Act of August 5, 1882, taking in payment therefor silver coins which are only about eighty-two per cent. of the value of United States gold coin,

whereas it is prescribed by the statute that they shall be issued not below par in United States gold coin or its equivalent. That by the proposed issue the petitioners, as citizens and taxpayers, would be injured ; that they have made a demand which the respondent has refused ; "Wherefore your petitioners pray that a writ of mandamus do issue out of this Honorable Court, requiring the said Minister of Finance to accept for said bonds only United States gold coin or its equivalent, and not to accept therefor the silver coins aforesaid, and not to issue such bonds except for their par value in United States gold coin or its equivalent, and for further relief," etc.

The return and answer of the respondent, denying the sufficiency in law and neglect of duty, etc., says that he is about to issue bonds to the amount and at the interest stated, and in accordance with the Act referred to by the petitioners ; denies that his intended issue is below par, and avers that he is about to issue the bonds at par ; denies that it is his duty to issue said bonds only upon receipt of their equivalent value in United States gold coin ; denies that he intends to receive or accept therefor coins of less value than the equivalent of the lawful money of this Kingdom, and (by amendment) avers that he is to receive for said bonds silver coin in half-dollar pieces of equal weight and fineness with United States silver coin of the same value, and lawful money of the Government of the Hawaiian Islands ; and denies that he has refused any lawful demand.

It is evident that if the respondent were about to make a legal issue of bonds, the petitioners could obtain no order of the Court in restraint thereof. The Act referred to, which is Chap. XXIX of the Session Laws of 1882, provides by Section First as follows :

"The Minister of Finance, under the direction of the King in Cabinet Council, is hereby authorized to borrow on the credit of the Hawaiian Government, from time to time, during the period of three years after the passage of this Act, such sums not exceeding in the whole the sum of two million dollars, for the purposes in this Act hereinafter set forth, for which sums the Minister of Finance may cause coupon bonds to be issued from time to time, for such amounts each as he may deem advisable, such bonds to be issued at not less than par, and to bear interest not

exceeding 6 per cent. per annum, payable semi-annually, and said bonds to be exempt from any Government tax whatsoever, and to be redeemable in not less than five nor more than twenty-five years, the principal and interest being payable in United States gold coin or its equivalent."

The averment and argument of the petitioners is that the intended issue would be illegal, because issued at less than par. They aver that the silver coins, which the respondent admits he will receive, are worth only about 82 per cent. of the value of United States gold coin, and the respondent does not deny this in his answer, and concedes in argument that such is the relative intrinsic value of these silver coins. The bonds are payable, principal and interest, in United States gold coin or its equivalent. What is their par value?

Par is the Latin word for *equal*. It has been adopted into the English language, and continues to have the same meaning and no other. Webster's Dictionary, in illustrating its meaning, says: "Bills of exchange are at *par*, above *par*, or below *par*. Bills are at par when they are sold at their nominal amount for coin or its equivalent." Bouvier's Law Dictionary uses the same terms.

Now, the nominal value, the value expressed in these bonds and their coupons, is ——— dollars, United States gold or its equivalent. When such bonds are issued or sold for the amount expressed in them, paid in United States gold or its equivalent, are they sold above par? And if they are sold for any sums of money, not being the same amount in such gold or its equivalent, are they sold at par or below par? These questions answer themselves; but it is not putting the case too strongly to say that eighty-two per cent. of a gold dollar is not equal or par to a gold dollar, although the eighty-two per cent. coin may, by usage or legal tender statute, circulate at a valuation of one hundred cents.

The statute under which these bonds may be issued determines the standard for their payment, irrespective of any other statute regulating currency, and their par value is the amount named in each bond in such expressed standard coin.

The question of the par value of bonds was considered in the case of "*The State of Illinois vs. Delafield*," 8 Paige, 526, and the

same, by appeal to the Court of Errors, in 2 Hill, 159, where the decree of the Chancellor was affirmed. Bonds of the State, issued for the purpose of making a canal, and by the statute required to be sold at not less than par, were sold by the defendant on credit, whereby the purchasers received interest for a term before the State received payment. This was held to be a sale at less than par, although it was shown that this allowance of interest was necessary to make up the cost of exchange in making the payment from New York to Illinois. Bronson, J., in delivering the opinion of the Court of Errors, says :

“The bonds were not to be sold at their market value, if less than the nominal sum secured by them. They were six per cent. bonds in all markets, and the Commissioners were forbidden by their power—the statutes of Illinois—to sell them at less than their par value. This can, I think, mean nothing else than pound for pound or dollar for dollar.”

After quoting the illustration above, taken from Webster, the learned Judge continues :

“It is a question about par value, and if that does not mean in this case a dollar in money for every dollar of security, the wit of man cannot tell us what it does mean.”

It will be noticed that the case at bar resembles in sundry particulars the case above stated. Our Act provides for a loan for certain purposes, which are specified, and what amounts from the loan may be applied to each, if the loan shall be made. The authority to the Minister is an authority to issue at not less than par. Our bonds are to be six per cent. bonds in all markets, and payable in United States gold coin. The language of the Court is a full reply to the argument made for the respondent, that a construction of the Act to require that these bonds be sold at par, in United States gold, or its equivalent, would defeat the statute, and therefore, to effectuate the statute for a loan, it must be construed so that a loan can be made ; and that, as United States gold or its equivalent cannot be got for the bonds, something of less value must be taken. The Minister of Finance is not held to secure the sale of the bonds. It is only his duty, when directed by the King in Cabinet Council, to make the loan,

to offer it upon the terms and with the limitations prescribed by the statute, the sole authority for the bonds. If they cannot be placed accordingly, the loan fails.

In this view, the Minister, in issuing the bonds below par, was about to do an illegal act. No doubt a loss and injury would accrue to the country thereby, and to every taxpayer; and the question is raised, whether the petitioners can resort to this Court to protect themselves.

It is said, for the respondent, that as the petitioners suffer no special and private injury, they cannot claim a standing in Court. There is authority for this position. Under some circumstances, it would be for the Attorney-General, or officer occupying an analogous position, to bring proceedings. In some cases, private parties, moving proceedings for mandamus or injunction, bring it in the name of the Attorney-General, and permission to do so is accorded as of course.

Merrill vs. Plainfield, 45 N. H. 126, may be cited as one of the cases supporting the right of individuals to bring action in a public matter; the Court saying that as the town by vote undertook to appropriate money in a manner unauthorized by law, any person who is a taxpayer in town, and liable to be assessed for any part of such sum, may properly interfere to prevent its payment and misapplication, and granted a perpetual injunction.

The principal objection to permitting suits to be brought by private taxpayers, is said to be the annoyance to public officers by a multiplicity of suits. The answer to this, as well as the doctrine in such cases, is set forth in a recent case in the Supreme Court of the United States, *Crampton vs. Zabriskie*, 101 U. S. Reports, heard in 1879. We quote the language of Mr. Justice Field at large:

“Of the right of resident taxpayers to invoke the interposition of a Court of Equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State Courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great dangers of their abuse, and the

necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for Courts of Equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. The Courts may be safely trusted to prevent the abuse of their process in such cases."

Another United States Supreme Court authority is *U. P. Railroad Company vs. Hall*, 91 U. S. 843, in 1875, where Strong, J., says:

"There is a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the Government as such, without the intervention of the Government law officer."

It is apparent that if there is to be a proceeding in the case at bar, it must be brought by some other person than the Attorney-General. The Attorney-General is bound by the statute defining his office to appear in defense of actions brought against Government officers. He does so in this case, and the respondent herein acts under the direction of the King in Cabinet Council, of which the Attorney-General is a member.

But does the jurisdiction of the Court extend to the King's Minister, acting under the direction of the King in Cabinet Council? He is an Executive officer, at the head of one of the Departments of the Government, and the Constitution provides that the three branches of the Government—the Executive, the Legislative and the Judicial—shall be forever distinct. We find an explication of the state of this question in High's Extraordinary Legal Remedies, Sec. 118, to this effect:

"The jurisdiction of the Courts by mandamus over Executive officers, including Governors of States, heads of Executive Departments of the General Government, etc., has given rise to questions of much difficulty, and not a little conflict of authority has resulted from the efforts of the Courts to apply the law of mandamus to such cases. Especially is there a difficulty with regard to the control of the Courts by mandamus over the Chief Executive." It is settled, and it was conceded by all counsel in argument of the case at bar, that mandamus would not lie to

compel purely executive or political functions and duties necessarily involving the exercise of official judgment and discretion.

The respondent here is not the Chief Executive, and we must look for our precedents to cases where mandamus has been sought to be applied to the heads of the Executive Departments, such as Cabinet Officers and State Secretaries. The writ has been granted in England to the Lords of the Treasury to compel payment of a pension; supported on the two grounds of a clear legal right on the part of the claimant, and the absence of any adequate remedy at law, in the ordinary course of proceedings. See 4 *Ad. & El.*, 286; also, *Regina vs. The Lords of the Treasury*, in re the Queen Dowager's Annuity, reported in 4 Eng. Law & Eq., where Lord Campbell, C. J., said no objection could be made to the jurisdiction of the Court to issue the writ of mandamus to the Lords of the Treasury.

The absence of other remedy is always a strong consideration in the application of extraordinary remedies. The remedy of impeachment is suggested for this case. If these bonds shall be issued illegally, and at a loss to the taxpayers of the Kingdom, the impeachment of the Minister, if carried, while it discredits him, does not make good the loss to the country, nor recall the bonds; and the Minister may not be in office when the Legislature next meets. Impeachment would not be an adequate remedy. Do other remedies lie? and is a Cabinet Minister amenable to the Court?

Our own statute concerning mandamus, Chap. 89, of the Acts of 1876, Sec. 5, is, that "It (the writ) may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may legally be required of them." If a Minister is a public officer, he must be included, for he is nowhere excluded from the force of the above provisions. It is claimed for him that he is not in that respect a public officer, for he is a part of the head Executive, and the Crown is not personally subject to the jurisdiction of the Court. But the Constitution provides that the Ministers are responsible. It would be an intolerable doctrine in a constitutional monarchy, to extend the inviolability of the Sovereign to his Ministry; to claim that what is directed to be done by the King in Cabinet Council, and is done by any of his

Ministers, is to be treated as the personal act of the Sovereign. Art. 42. "No act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible."

The application of the above quoted section 5 of the Mandamus Act must be carefully made, according to the principles partially expressed above respecting matters of discretion. The Courts will not undertake to guide the judgment and discretion of public officers, which would be to assume the supervision of all branches of Government; but will only intervene to compel the performance of purely ministerial duties. See *United States vs. Guthrie*, 17 How. 284; *Brashear vs. Mason*, 6 How. 92; *Kendall vs. United States*, 12 Pet. 524; *Decatur vs. Paulding*, 14 Pet. 497. To that jurisdiction the Ministers of the Crown, and all other public officers in this Kingdom, are subject.

But it must have been perceived that the statute, of which we have quoted Section 5, as well as all the authorities we have cited, refer to the performance of some duty. This is indeed the nature of a mandamus—a command to do something. What is it here prayed that the Minister of Finance is commanded to do? *First*, to accept for such bonds only United States gold or its equivalent; *second*, not to accept therefor the silver coins aforesaid; *third*, not to issue such bonds except for their par value in United States gold coin or its equivalent.

These are all prayers for a command to *do not* certain acts or act—that is, for a restraint or injunction.

What is the province of a writ of mandamus, as compared with a writ of injunction, is set forth in Section 6, of High on Extraordinary Legal Remedies.

"A comparison of the writ of mandamus, as now used in both England and America, with the writ of injunction, discloses certain striking points of resemblance, as well as divergence, in the two writs. Both are extraordinary remedies; the one the principal extraordinary remedy of Courts of Equity, the other of Courts of Law, and both are granted only in extraordinary cases, where otherwise these Courts would be powerless to administer relief. Both, too, are dependent, to a certain extent, upon the exercise of a wise judicial discretion, and not grantable, as of

absolute right, in all cases. It is only when we come to consider the object and purpose of the two writs, that the most striking points of divergence are presented. An injunction is essentially a preventive remedy; a mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction—those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters in *statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is therefore a positive or remedial process; the other a negative or preventive one."

We cannot command that the respondent borrow money and issue the bonds, for it is clearly discretionary with the King in Cabinet Council to direct, and with the Minister to offer them. We cannot compel the Minister to take United States gold or its equivalent, for he may not be able to get it. If no takers are found on the terms prescribed, the bonds cannot be issued at all. It is impossible to compel the Minister of Finance to take what is not offered. What was sought was to enjoin the Minister from taking silver half-dollars for gold par bonds, an act which we have pronounced illegal. But the distinction between mandamus and injunction must not be nullified. This Court is not disposed to enforce technicalities. But this is not a technicality. It goes to the very essence of the remedy applied for, and could properly have been raised by demurrer, as it is a matter apparent on the face of the petition.

Here are two forms of proceeding, having different origins and plain differences in application. The petitioners ask for the one remedy, while the case essentially demands the other. The issue of mandamus on this state of facts would afford a precedent for a disregard of modes of procedure which it is important to preserve, and for which we find no authority.

The writ is therefore discharged.

Mr. Hartwell, for petitioners.

Mr. Attorney-General Neumann and *Mr. Preston*, for respondent.
Honolulu, January 2, 1884.

E. B. THOMAS vs. TRUSTEES OF THE LUNALILO ESTATE.

**APPEAL FROM JUDGMENT ENTERED UPON AN AWARD OF
ARBITRATORS.**

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

An award made bona fide and in accordance with the terms of the submission, held to be conclusive on the parties.

A clause in the submission allowing an appeal, the appellate court to fix costs of the appeal, does not take the case out of the Statute.

Sections of the Code, referred to in the decision, are as follows :

- 2933. If there is no provision in the submission concerning the costs of the proceedings, the arbitrators may make such award respecting the costs as they shall judge reasonable. * * *
- 2936. Any party deeming himself aggrieved by the decision of the justice before whom motion for judgment is made upon the award, may take an appeal to the Supreme Court in banco. * *

OPINION OF THE COURT, BY AUSTIN, J.

THIS is an appeal from an award entered up as a judgment of the court in favor of the plaintiff.

The appellants claim that the item of \$2,500 for extra work in cutting stone was not submitted to the arbitrators by the agreement to arbitrate, and that the contract which was attached to that agreement showed that the extra work must be specified in writing or it could not be charged for, and that a mistake of fact was also made in not charging plaintiff \$5 a day for time beyond the contract time for completing the contract; and that in allowing the \$3,500 item, the arbitrators made a clear mistake of law, and a mistake of fact in disallowing the other item; and that for these reasons the award is void and the judgment must be set aside.

In examining the agreement to arbitrate, it appears that the item of \$2,500 was submitted specifically to the arbitrators, and on reading the testimony, that the parties testified fully about it.

The arbitrators must have thought upon the evidence that there

was a substantial waiver of the requirement to specify the extra work in writing, which was binding in law. We are not prepared to say but that they were right in so finding. They certainly had a right to proceed to see whether the item could or ought to be allowed.

Upon the item of extra time at \$5 a day taken to complete the work, the arbitrators must have found that the circumstances showed a waiver of the clause providing a day for completion. The evidence seems to show such a waiver.

The award seems to have been made in accordance with the terms of the submission, and it appears that it was not made by collusion or fraud, nor is this claimed by the defendant.

By numerous cases "it is well settled that the award, if made in good faith, is conclusive upon the parties, and that neither of them can be permitted to prove that the arbitrators decided wrong either as to the law or the facts of the case."

Winship vs. Jewett, 1 Barb., Ch. 173, 184; *Jackson vs. Ambler*, 14 Johns, 105; *Mitchell vs. Bush*, 7 Cow, 185; *Perreman vs. Steggal*, 9 Bing. 681; *Lancaster vs. Kennington*, 4 Ad. & El. 347.

The defendants' counsel further claim that the clause allowing an appeal in the agreement to arbitrate, and allowing the appellate court to fix the costs in case of appeal, takes the case out of the Statute. We think not. The appeal referred to is the one mentioned in the Statute, Sec. 936, and under Sec. 933 the arbitrators have properly provided for the costs of arbitration.

The judgment must be affirmed.

E. Preston and J. Russell, for plaintiff,

S. B. Dole and W. O. Smith, for defendants.

Honolulu, January 7, 1884.

J. W. MAGUIRE, Fire Marshal, *vs.* TONG WO.

APPEAL FROM POLICE JUSTICE, HONOLULU.

SPECIAL TERM, DECEMBER, 1888.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Where a statute prescribes that a person violating the provisions of such statute, after written notice, shall be liable to a penalty, a printed circular, warning all persons against violations, but not calling attention to any specific breach found to exist, and not directing any specific alterations, is not a compliance with the statute.

OPINION BY McCULLY, J.

THE plaintiff brings action in the Police Court to recover penalty for breach of fire ordinance, under Sec. 338 of the Civil Code.

"SECTION 338. It shall be the duty of the Fire Marshal twice in every year, and as much oftener as he may deem proper, to examine the dwelling houses and other buildings in the respective districts for the purpose of ascertaining any violation of this law; and also to examine the fire places, hearths, chimneys, stoves and stove pipes in the respective districts, and upon finding any of them defective or dangerous, he shall direct the owner or occupants by written notice to alter, remove or amend the same, and in case of neglect so to do, the party offending, on conviction, shall forfeit and pay twenty-five dollars for the benefit of the Fire Department, and for every day of the time allotted for such alteration, removal or amendment, the party so offending shall forfeit and pay the further sum of ten dollars, and the Fire Marshal may make such alteration, removal or amendment at the expense of said owner or occupant."

The Police Justice held that the defendant had not received legal notice, upon the following state of facts:

The plaintiff delivered the defendant a copy of the following circular:

"HONOLULU, October 1, 1878.

"SIR—Your attention is respectfully directed to the following

Sections of Chapter LXIII of the Penal Code, relating to the Fire Regulations of this city.

"The following are a few of the more important points to which you will be expected to give your immediate attention, viz.:

"1st. To provide yourself with fire buckets, in accordance with Section 348.

"2d. All openings for stove pipes, whether in side, end or roof of building, must be at least two inches in the clear all around larger than the pipe, this space being closed with a sheet of zinc or iron, through the center of which the pipe shall pass.

"3d. All stove pipes above referred to must extend at least two and one-half ($2\frac{1}{2}$) feet above the building from which they project, or above any wooden building joining thereto, and if the pipe projects horizontally from the end or side of the building, it shall be furnished with an elbow and a perpendicular pipe reaching to the height above mentioned, taking care that the outside pipe is at least one and one-half ($1\frac{1}{2}$) feet from any wooden structure.

"4th. Kitchen floors, if of wood, must be covered with zinc, lead or iron under the stove or cooking apparatus, and the sides of the building must be covered in the same way if the stove or other apparatus in which fires are built stands within two and one-half ($2\frac{1}{2}$) feet of the side of the room.

"5th. It is strictly forbidden to build fires in packing cases or other small wooden structures, except they be lined with iron or zinc, leaving at least a two (2) inch air space between the wood and lining.

[Here follow Sections 338, 339, 347 and 348 of the Civil Code, and the conclusion of the circular]:

"Hoping that you will take due notice of the foregoing and require no further prompting, I remain, yours respectfully,

"JAS. W. MAGUIRE, Fire Marshal."

A copy was also posted on defendant's building. The copy furnished the defendant was in the Chinese language. The plaintiff testifies that he visited the defendant's premises several times, and notified and directed him as to his supply of fire buckets, and as to defects in his stove pipe, but that he gave him no other written notice.

The statute provides that there shall be given written notice to alter, remove or amend defects. It must be strictly construed, for it is in derogation of the common law right of individuals to control their own premises. As a written notice is prescribed, all the oral directions of the plaintiff are to be discarded. The defendant, then, received no other written notice than the delivery to him of the circular. Clearly this circular does not notify him of any defect on his premises, It is a printed circular, which may be left at every building in the city, calling attention to sundry sections of the law and certain regulations of the Fire Marshal. It does not follow from the service of this that any person receiving it has failed to comply in any or all respects with the law and regulations. It may be distributed annually. Good citizens will be reminded of what is required of them, but no one by receipt of this has written notice to repair a defect which the Fire Marshal has found to exist.

The ruling of the Police Justice is sustained, and judgment given for the defendant.

J. L. Kaulukou, for plaintiff.

C W. Ashford, for defendant.

Honolulu, January 7, 1884.

CHARLES NOTLEY *vs.* THEOPHILUS H. DAVIES.

APPEAL FROM THE DECISION OF ARBITRATORS ON AWARD.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

If the Court is satisfied that an award is within the terms of the submission, it will not be set aside.

The Court cannot reconsider the evidence upon questions properly submitted to the arbitrators.

The presumption in favor of an award will be that the arbitrators rightly performed their duties.

OPINION OF JUDD, C. J., APPEALED FROM.

ON the 25th day of June, 1883, the parties herein agreed in writing to submit certain differences between them to the arbitration of R. F. Bickerton, Cecil Brown and F. M. Hatch, or a majority of them. This was duly acknowledged before a Justice of this Court, and entered as a rule of Court.

On the 27th July a majority of the arbitrators made an award, which was delivered to the Court, and on the 22d of October the Court was moved to cause the award to be entered up as a judgment of Court. To this Mr. Dole, on behalf of the defendant, objects and moves that the award be set aside on the ground that the award has not been made in accordance with the terms of the submission. Mr. Dole particularizes as follows: The parties agreed by the submission "to submit all matters now in dispute between them," as follows: 1st. "Claim of Notley against Davies for damages resulting from alleged delay in erecting mill," etc., etc. The submission ends, "All of said matters arising from contract between parties dated April 1, 1878."

It was shown to the Court, or admitted, that the cane for which was awarded \$3,000 -and interest, as damages resulting to Notley from delay of Davies in erecting sugar mill, was thirty-four acres of sugar cane planted by Notley, July 1, 1877, some eight months previous to the contract. That by the contract Davies agreed to "erect sugar works for the purpose of manufacturing into sugar the cane grown" by Notley, and Notley agreed to plant every year during the time, not less than 150 acres of cane.

It was also admitted that the cane for which damages were awarded was ripe January 1, 1879, and that it was agreed by the parties that it might stand till June, 1879. Also that the mill was ready and commenced to grind April 15, 1880.

It is claimed for Mr. Davies that the award for damages for this cane was not in accordance with the submission, as not being cane planted in pursuance of the agreement of April 1, 1878.

It is claimed for Mr. Notley that as this cane was in the ground and growing when Mr. Davies made the contract to put up a mill, he must have had it in contemplation.

BY THE COURT.

The province of the Court in a case like this is to be satisfied that the award accords with the terms of the submission, but the Court cannot reconsider the evidence upon the questions properly submitted to the arbitrators. The question, therefore, before me is whether the damages claimed by Mr. Notley, as resulting to him for delay of Mr. Davies in grinding this thirty-four acres of cane, is fairly within the terms of the submission.

It is true that Notley only binds himself to plant at least 150 acres per annum, but he also binds himself that no cane grown within two miles in width or one mile in length of the sugar works shall be ground at any other mill than Mr. Davies'. And Mr. Davies undertakes to erect, on a mill site to be conveyed to him by Notley, sugar works of first class, capable of taking off six tons of sugar per day, and to grind and manufacture into sugar *all cane to be delivered* at said sugar works by Notley, etc., and the thirty-four acres are not specifically exempted from the operation of this contract.

It is proved, as I have above said, that Davies was aware that this cane was planted when the contract was made, and had in fact advised Mr. Notley to plant fifty acres, and not ten, as he at first contemplated. It stood, ready for grinding, as late as June, 1879. The first 150 acres of cane planted since the contract was ready to be harvested in the fall, say November, 1879. I think it could reasonably be expected of Mr. Davies, that, as this thirty-four acres of cane was only eight months old when the contract was signed, his mill should have been erected in season to take this field off. If he had done so, the mill would only have lain idle a few months before the first regular crop under the contract was ready to be ground.

Mr. Notley had bound himself not to take his cane to any other mill, and it seems to me that he had a right to expect Mr. Davies to erect his mill in not much over one year from the time when the contract was signed, or in time to grind all Mr. Notley's cane.

I cannot say that the arbitrators have gone beyond the scope of the submission in awarding damages for the thirty-four acres as claimed, and I accordingly overrule the objections, and order the award to be entered up as a judgment of Court.

OPINION OF THE APPELLATE COURT BY AUSTIN, J.

THE court refer to the opinion of the Chief Justice below, and add that the only question is whether the question as to the damages awarded for not grinding the plaintiff's 34 acres of cane was within the terms of the submission. If it was not, then the award should be set aside.

Caldwell on Arbitration, 98, 99.

"But there should be no strained construction to take the award out of the submission."

Billing on Award 121: Com. Dig. Art. 29.

And says Lord Eldon, Chancellor, in *Wood vs. Griffiths*, 1 Swanst. 43, cited in Billing above: "In modern times, in construing an award it has been considered the duty of the Court to find that it is certain and final, instead of leaving it to a construction which would in effect destroy nine-tenths of the awards ever made, and if possible put one consistent sense on all the terms."

The damage to the thirty-four acres was litigated, and we think properly so, under the contract of April 1, 1878. True, the thirty-four acres were planted July 1, 1877, but when the contract was made they were standing plant cane.

Clause 5 of the contract says: "The party of the second part agrees to grind the plant cane of the party of the first part (not to exceed 200 acres in each year) in preference to any other cane, and to grind the rattoons of said party of the first part in preference to any other rattoons."

And, by Clause 1, the party of the first part agrees to plant not less than 150 acres each year of the contract. We think it may be fairly said that Clause 5 refers to the cane standing when the contract was made.

For this reason, and for the reasons given by the Chief Justice, we think the award accorded with the submission.

If the question as to the thirty-four acres of cane was not properly submitted, it may still be litigated. The object of submissions to arbitration is to avoid litigation.

"The presumption in the favor of an award will be that the duty was rightly performed."

Doe vs. Stilwell, 8 Ad. & El., 645, Lord Denman, C. J.

The judgment must be affirmed with costs.

F. M. Hatch, for plaintiff.

S. B. Dole, for defendants.

Honolulu, January 7, 1884.

KALAEOKEKOI vs. KAHELE *et al.*

APPEAL FROM THE DECISION OF THE CHANCELLOR.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY AND AUSTIN, JJ.

A bill to set aside the second of two alleged Royal Patents for the same land, dismissed, it appearing that the so-called second patent was the original, and that the copy made of it in the Land Office Register had been fraudulently altered.

Poverty is not a legal excuse for laches.

Courts of Equity follow the statute of limitations.

In an action to cancel a Royal Patent, plaintiff cannot, as in ejectment, recover so much land as he is entitled to; but the relief prayed for must be either granted or denied.

OPINION OF THE COURT, BY McCULLY, J.

On appeal from the decision of the Chancellor dismissing the bill.

The bill sets forth that a Land Commission Award was made March 25, 1854, to Kalaeokekoi (ancestor of the plaintiff) and his heirs for certain parcels of land at Kamakela, in Honolulu; that, on the 6th of June, 1855, a Royal Patent for the said awarded lands was issued to Kalaeokekoi, his heirs and assigns; that at some time unknown to the plaintiff, but believed by him to be on or after the said 6th of June, 1855, a Royal Patent for the same lands was issued to a person believed by the plaintiff to be one Kalakini, now deceased, to "Kalaeokekoi for Kalakini." That the plaintiff believes that the last-mentioned patent was obtained by Kalakini without right, through fraud. That the plaintiff is

entitled to this land by descent from Kalaeokekoi 1st, deceased intestate, but that the defendants are in possession, claiming through the said Kalakini by virtue of the last-mentioned Royal Patent. And by amendment after demurrer, that his mother, heir-at-law of Kalaeokekoi 1st, was in possession from his death to her own death in 1869. And that while he knew of the wrongful possession of the defendant, he was then and for a long time afterwards too poor to bring suit. The bill prays that the second mentioned Royal Patent may be surrendered, ordered to be cancelled by the Court, and that defendants be enjoined from using the same as a defense in actions to recover the said land.

The answer denies, on information and belief, that a patent was issued to Kalaeokekoi and his heirs, but avers that it was issued to Kalaeokekoi for Kalakini; denies fraud or mistake, and avers that at the date of the issue thereof, Kalakini was in possession, and has held by herself and her heirs, the defendants, till now.

BY THE COURT.

The subject matter of the bill is the Royal Patent, which it is prayed be cancelled, and to that instrument, in comparison with the record in the Land Office and the copy from that record produced by petitioner, we have given much examination. The course of business in the Land Office has been to make a copy in a folio-register of each Royal Patent before delivery. The one original document is the patent signed by the King, countersigned by the Minister, and impressed with the great seal. A certified copy from the register can be obtained by any person on payment of the prescribed fee.

The portions of the two patents which it is necessary to comment upon are as follows (the words in italics are erased from the register, and the words which follow in brackets have been written over the erasures, the petitioner's copy conforming to the altered register):

No. 1985, Royal Patent, upon confirmation of the Land Commission. Whereas, the Board of Commissioners to quiet land titles have, by their decision, awarded unto Kalaeokekoi for *Kalakini* [for his heirs] Land Claim 6245, No. 1, an estate of freehold less than allodial, in and to the land hereinafter de-

scribed, and whereas, the said (the words "the said" crossed over but not erased in the register, and are omitted in the petitioner's copy,) Kalakini has commuted the title, as awarded, for a fee simple title, by the payment of the sum of three hundred and forty dollars into the Treasury. Therefore, Kamehameha, King, etc., etc., has this day granted and given absolutely, in fee simple, unto Kalaeokekoi for *Kalakini* [his heirs] all that certain piece of land, etc. To have and to hold the above granted land in fee simple unto the said Kalaeokekoi for *Kalakini* [his heirs], her heirs and assigns forever, etc.

Both instruments are dated June 6, 1855.

The original patent before us proves itself. The Court takes judicial notice of the signature of the then King, Kamehameha IV., and of the Kuhina Nui, Victoria K. Kamamalu, countersigning it, as well as of the seal affixed. Two members of the Court have also personal knowledge of these signatures, as well as of the handwriting of the then Chief Clerk of the Interior Department, by whom the patent is written. It is unquestionably the authentic original patent issued on the 6th of June, 1855. There is no proof whatever to support the allegation that an original Royal Patent was issued to "Kalaeokekoi for his heirs," in the form of the copy which the petitioner presents, on the 6th of June, 1855, or at any subsequent day; and all the inferences from the regular course of business in the Land Office are that there were not two original patents signed by the King and countersigned by the Minister, issued the same day or on different days to different parties, for the same piece of land.

The hypothesis on which this bill is brought and sought to be maintained, therefore, fails at its initial point.

It is next claimed, in argument, that this genuine patent was issued by fraud or mistake, and that subsequently, the mistake having been discovered, the register was amended to correspond with what the patent should have been made. The petitioner wholly fails to show any proof or probabilities in support of this surmise. On the other hand, the facts all correspond with another hypothesis, namely: that at some time after the issue of the patent, the register was fraudulently altered to enable the

petitioner to present such a certified copy as he now bases his claim upon. Two things defeat the attempt. First, the existence of the original and authentic patent. The parties to the scheme may have reckoned on the loss of this instrument, as many other patents have been lost, destroyed by fire, or other casualty. The instrument before us is worn by handling into pieces, but no part of it is obliterated. It shows what was granted, and what was once recorded in the records of the Land Office. Secondly, the blunders and inconsistencies in the alterations. The altered instrument is made to read as a grant to "Kalaeokekoi for his heirs," instead of to Kalaeokekoi and his heirs, which is averred in the bill, and which would have been the proper grant if it had been to Kalaeokekoi. The habendum has the double blunder of reading "to the said Kalaeokekoi for his her heirs." It should be said that Kalaeokekoi was a man and Kalakini was a woman, so that in the original the pronoun her is used throughout, while the alterations to "his" failed to erase or change the last "her." And in the beginning of the instrument there is the amazing oversight of leaving it to read that, whereas Kalakini has paid a commutation of \$340, a fee simple title is accordingly granted to Kalaeokekoi.

The alterations are so imperfectly and inconsistently made that the register could be restored to its original verity, even without the aid of the extant original patent.

The Court is asked to cancel an authentic Royal Patent in favor of a record bearing such badges of fraudulent alteration. This cannot be done.

But the petitioner contends that the original Royal Patent to Kalaeokekoi for Kalakini should be cancelled, as being at variance from the award, which was made to Kalaeokekoi for his heirs.

The petitioner avers possession in his ancestor of the granted lands for a prescriptive term. This is denied by respondent, and on examination of the proofs, we find that the possession of the major part of the land was in the heirs of Kalakini since 1862, and as to the remaining part, there was undisputed possession for fifteen years. The petitioner has shown that he became of legal age about a year after the Royal Patent was issued, and was under no disability, except that of poverty, which

cannot be seriously contended to be a legal excuse for his laches. The possession of the respondent should have put him on enquiry. Courts of equity act in obedience to the statute of limitations, and as the larger part of the estate is shown to have been in the possession of respondents for twenty years, the statute is a complete defense, and compels equity to deny relief on the ground of laches.

See *Kalakaua et al. vs. Keaweamahi et al.*, 4 Hawn. Repts. 477.

So far as the Royal Patent covers the land shown to have been in respondent's possession for a less period than the statutory limit, that is, for fifteen years, we think that the petitioner is not entitled to relief. This is not an action of ejectment, wherein the plaintiff can recover so much of the real estate as he has shown title to, but it is a bill to cancel the whole patent, and the petitioner must either have the relief prayed for, or it must be denied him.

We think this sufficient upon which to dismiss the bill. But if only fifteen years of adverse possession of respondents be considered as shown, this, under the circumstances of this case, is evidence of such laches on the part of the petitioner in the prosecution of his rights, and of such unreasonably long acquiescence in the assertion of the adverse claims of the respondent, as to oblige equity to decline to interfere in his behalf.

Story's Equity Juris., Sec. 1520 and notes, may be referred to as supporting this doctrine.

Bill dismissed.

Dole and Bickerton, for petitioner.

Hatch and Brown, for respondents.

Honolulu, January 8, 1884.

CHAS. A. CHAPIN *vs.* T. P. TISDALE *et al.*

EXCEPTIONS FROM THE RULING OF McCULLY, J.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

An agreement contained the following clause: "And it is also further
" agreed in consideration of the distance from said mill that
" the parties of the first part their heirs and assigns will pay
" to Charles A. Chapin his heirs and assigns the sum of three
" (3.00) dollars per ton on all the sugar produced from thirty-seven
" and one-half ($37\frac{1}{2}$) acres of cane, and rattoons of each crop, dur-
" ing the above term of ten years, said number of tons per acre to
" be an average of the entire crop of cane and rattoons each year."

The words " $37\frac{1}{2}$ acres of cane and rattoons," held to mean $37\frac{1}{2}$ acres of both together, not $37\frac{1}{2}$ acres of each.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action for an alleged breach of covenant contained in an agreement between the parties. The plaintiff, and another who has now parted with his interest, therein agrees to plant not less than 75 and not more than 150 acres of sugar cane yearly for the term of ten years, irrespective of rattoons, and the defendants agree to grind and manufacture the same for a certain share stated. The agreement is lengthy and goes into many particulars. The covenant upon which this action is based, is as follows:

"And it is also further agreed in consideration of the distance
" from said mill that the parties of the first part their heirs and
" assigns will pay to Charles A. Chapin his heirs and assigns the
" sum of three (3.00) dollars per ton on all the sugar produced from
" thirty-seven and one-half ($37\frac{1}{2}$) acres of cane, and rattoons of
" each crop, during the above term of ten years, said number of
" tons per acre to be an average of the entire crop of cane and
" rattoons each year."

The plaintiff claims the sum of \$800.60, being the sum of three dollars a ton upon sugar made from $37\frac{1}{2}$ acres of plant cane and $37\frac{1}{2}$ acres of rattoons, and requested the presiding justice to charge

the jury that he was entitled to this sum upon a proper construction of the agreement. The court declined to grant this instruction, but directed the jury to find a verdict for the plaintiff for \$431.72, being a sum at the rate of \$3.00 per ton upon $37\frac{1}{2}$ acres.

We are now to decide what is meant by the words "thirty-seven and one-half acres of cane and rattoons." Do they mean thirty-seven and one-half acres each of cane and rattoons, that is, seventy-five acres of sugar-cane composed of either or both plant cane and rattoons, or thirty-seven and one-half acres of cane only, whether the same be plant cane or rattoons?

Words in a contract are to be construed in their plain and ordinary meaning, and where a meaning can be derived from them without the interpolation of other words, this meaning must be received as the one intended by the parties. To give the words "thirty-seven and one-half acres of cane and rattoons," the meaning contended for by the plaintiff, would require that the word "each" be inserted, or some other word to show that it was intended that $37\frac{1}{2}$ acres of plant cane and also $37\frac{1}{2}$ acres of rattoons was to be reckoned as the average upon which the sum of \$3.00 per ton of sugar produced therefrom was to be paid.

We are not impressed with the argument that as 75 acres was the minimum acreage to be planted each year, this must be assumed to be the acreage on which the \$3.00 per ton was to be assessed, for the cane raised on this amount of land would be all plant cane and not rattoons. Moreover the distance from the mill was the consideration for this allowance and not the quality of the cane to be carted, whether plant or rattoons, it not appearing that one is more difficult to cart than the other.

By Section 16 of the Civil Code, "each of the terms *or* and *and* has the meaning of the other or both, when the subject matter, sense and connection require such construction." The word "and" between "cane" and "rattoons" means both "and" and "or," and applying this rule of construction to the words of the contract, it may be read as follows: \$3.00 per ton was to be paid by the defendants on all the sugar produced from thirty-seven and one-half acres of cane and (or) rattoons, it is immaterial which, for the number of tons was to be an average of the entire crop of cane and rattoons each year.

As to the matter of carting, the cane and rattoons were not separated in the contract. If there were to be thirty-seven and one-half acres of cane and thirty-seven and one-half acres of rattoons, to average the tons per acre of plant cane and rattoons separately to the whole acreage of plant cane and rattoons would be unfair and was not intended.

The exceptions are overruled.

E. Preston, for plaintiff.

F. M. Hatch, for defendants.

Honolulu, January 8, 1884.

CECIL BROWN, Administrator, *vs.* BISHOP & CO.

EXCEPTIONS FROM THE DECISION OF THE CHIEF JUSTICE.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

An account in a savings bank pass-book was headed "B. & Co. in account with L. K. to order of his father, K.," and it was a rule of the bank to pay only to the person to whose order the deposit was payable, and only on presentation of pass-book: the bank paid it to the administrator of K. (the father), who held the pass book: held that the administrator of the son could not recover the deposit from the bank.

Money deposited in a savings bank by a father, to account of his son but payable to order of himself, is an incomplete gift *inter vivos*, and does not pass title to the son, for there is no delivery to the son or to a third party for him.

Decision of the Chief Justice affirmed.

OPINION OF THE COURT BY AUSTIN, J.

THIS is an action of assumpsit in which the Chief Justice below directed a verdict for the defendants.

The facts upon which the plaintiff claimed to recover are sub-

stantially as follows: The defendants are bankers and have a department of their business which they term a Savings Bank. A pass-book on this Savings Bank is presented, which shows a deposit on April 11th, 1879, of three hundred dollars in silver, and credits of interest, making with the principal on March 11, 1888, the sum of \$372.71.

These deposits are preceded by the statement, "Bishop & Co. in account with Lukela Kaaimanu to order of his father, Kaaimanu."

The plaintiff sues as administrator of Lukela Kaaimanu, who died a minor, and who was the son of Kaaimanu, who is also dead, and whose administrator duly appointed was, as such, paid the sum claimed by the defendant on March 13, 1888, on presentation by him of the said pass-book and letters of administration. It was also shown that it was a rule of the bank to pay deposits only on presentation of the deposit book, and also a rule to pay only to the person to whose order the money was payable and not to the person for whose benefit the money was deposited. A demand and refusal of payment by the defendant to the plaintiff was also shown.

The best view that can be taken for the plaintiff is that the fund belonged to his intestate, and that he allowed his father, Kaaimanu, to keep his bank book, and made the money mentioned in it payable to his father's order, and told the defendants, in writing, so to pay it. But that his own death, and the death of his father also, were each sufficient to revoke the power to draw the money in behalf of the father's estate, and so the money was improperly paid over.

This view cannot be sustained. The words in the bank book were sufficient to constitute a valid direction to the defendants to pay the money only to the order of the father. From it the defendants had a right to infer that the father had, for value given by him, the right to draw the money. The delivery of the book, and the words written in it, were equivalent to a draft or a check on the defendants' bank, payable to the order of the father, and at the father's death his administrator could draw the money, as he could on such a draft or check. The defendants were not agents of anybody. They were mere depositories. As

such they were bound to deliver the money to the father or his representative, as directed by the son, the bailor.

See Story on Bailments, Secs. 102, 103, 104 and 107.

If, before payment, the plaintiff had notified the defendants not to pay the money, the case might have been different, but there is no such pretense. *Id.*, Section 104.

Furthermore, we think that the rules of the defendants, as a savings bank, which were proved, were binding upon the plaintiff's intestate as a depositor, and that under those rules the defendants properly made the payments to the father's administrator.

Wall vs. Provident Institution, 3 Allen, 96: 21 N. Y., 543.

But the facts show that when the deposit was made the plaintiff's intestate was an infant; and the presumption would be that the father deposited his own money; that he retained the possession of the bank book, and caused the money to be made payable to his own order. It would seem that he intended a gift of the money to the son. But by his acts he controlled and intended to keep control of the fund. If this were so, the gift was incomplete, because there was no delivery.

In *Little vs. Willets*, 55 Barb. 125-9, the Court declare what we think is the true rule, that "No gift *inter vivos* is sustained as conferring title unless the change of possession be positive, and the donor in no condition to re-possess himself of the subject matter of the gift or to recall the same."

Further: In *Phelps vs. Phelps*, 28 Barb. 121, it is held that "A mere promise to give money cannot be enforced, even if put in the form of a promissory note; nor can such a note, when given by a parent to a child, be enforced against the maker's estate after his death."

See also *Harris vs. Clark*, 3 Comstock 93, where a draft upon a third person was given by a donor to a donee, which it was held could not be enforced as a gift against the donor's estate after his death. Also, *Brabook vs. Boston Bank*, 104 Mass., 228.

The plaintiff claims that in this case there was a delivery by the donor to a third party, the defendants, for the donee, and that this makes the delivery sufficient.

This would have been so had the deposit been made without

the condition attached, that it should be paid to the depositor's own order.

The exceptions must be overruled.

F. M. Hatch, for petitioner.

A. S. Hartwell, for defendant.

Honolulu, January 10, 1884.

J. M. HERBING *vs.* C. T. GULICK, Minister of Interior.

APPEAL FROM DECISION OF AUSTIN, J., SUSTAINING DEMURRER.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

A statute providing an adequate remedy for private parties damaged by the taking of their land for public use, supersedes the remedy at common law.

OPINION OF THE COURT BY JUDD, C. J.

THIS is an action on the case claiming \$1,500 damages for the taking and appropriating by defendant's predecessors in office of certain water from plaintiff's land in Makiki valley. This is demurred to on the ground that an Act of the Legislature, passed in 1860 and amended in 1878, authorized certain land and water within certain prescribed limits in the range of mountains back of Honolulu to be condemned for the purposes of the Honolulu Water Works, and provided for the appointment of commissioners to assess the damages to individuals thus sustained, and that the plaintiff's land is situated within these limits, but that the complaint does not set forth that application had been made to the commissioners to settle the plaintiff's claim, or that any statutory steps had been taken to secure it. The position of the defendant, on argument, was that the common law remedy of the plaintiff for the injury complained of is superseded by the statute referred to. This is, in effect, a plea to the jurisdiction, for if

the Court should hold that the statutory remedy was exclusive, no amendment could cure the complaint.

The rule of the law is that "when the remedy provided by statute is complete, the common law remedy is superseded by the statute, and the person injured must pursue the course pointed out by the Act. In such case the statutory remedy is not merely cumulative upon the common law action, but an entire substitution for it, and must be exclusively pursued," *Mills Em. Domain*, Sec. 87. The cases sustaining this view are *Hagg vs. Worcester*, 13 Gray, 601; *Stevens vs. Middlesex*, 12 Mass., 466; *Calkin vs. Baldwin*, 4 Wend., 667; *Hovey vs. Mayo*, 43 Me., 322, and many others.

In *Brewer vs. Chase*, 3 Hawn., 186, this Court held that "It is a general rule, where the common law prevails, that a statute remedy is merely cumulative, unless the common law remedy is expressly or impliedly repealed. But if a statute confers a right and an adequate means of protecting it, the statutory remedy is exclusive, and if the enforcing tribunal is specified, that alone can be resorted to." This principle was affirmed in *Stone vs. Allen*, 3 Hawn. R. 621.

Says Cooley on Torts, p. 652, "But the common law remedy may be excluded by implication, as well as by express negative words, and where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy whereby the party injured may obtain redress, the inference that it was intended to be the sole remedy must generally be conclusive. It has been so held in many cases where land or other property has been taken for public use under the eminent domain."

As early as 1815, Parker, C. J. (in *Stevens vs. Middlesex Canal*, 12 Mass., 466), held "that where the Legislature authorizes the making a canal, and provides a special mode of redress for those who are injured in their property by the natural and necessary effect of making the canal, no action for such injury lies at the common law." The learned Judge says: "The Legislature has taken care to provide a cheap, easy and convenient mode of redress for all who might suffer by the accomplishment of a great public object, and it must be considered as intended by it to deny the remedy at common law."

The same principle is stated by Hoar, J., in *City of Worcester vs. Commissioners of Worcester*, 100 Mass., 106, as follows: "The general policy of the law in regard to private property taken for public use is undoubtedly this: That the estimate of damages shall be made in the first place by or under the authority of some tribunal by whom it can be made more promptly and cheaply than by the intervention of a jury."

The Act of the Hawaiian Legislature, p. 24, Laws of 1860, "authorizing the Minister of Interior to take possession of whatever land and water may be required for the use of the Honolulu Water Works," provides that compensation shall be made to those injured thereby, and an adequate remedy is provided by which they can obtain redress, and by all the authorities the inference that this was intended to be the sole remedy is conclusive.

The appeal is dismissed and demurrer sustained.

W. A. Kinney and S. B. Dole, for plaintiff.

W. A. Whiting and C. W. Ashford, for defendant.

Honolulu, January 12, 1884.

THE KING *vs.* AH LIN.

EXCEPTIONS FROM THE DECISION OF JUDD, C. J.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

A Cabinet Minister, who holds the office of Attorney-General *ad interim*, held, following *Rex vs. Kananu*, 3 Haw., 689, to be *de facto* duly qualified to present an indictment: whether he is Attorney-General *de jure*, will not be considered on motion to quash an indictment drawn by him.

OPINION OF THE COURT, BY AUSTIN, J.

This case comes here on exceptions to the decision of the Court overruling a motion to quash the indictment against the defendant for perjury, on the ground that it was not drawn by a duly qualified Attorney-General or his deputy.

The facts are conceded to be that, in May, 1883, Walter Murray Gibson, Minister of Foreign Affairs, was appointed by the King Attorney-General *ad interim*, in place of Edward Preston, Attorney-General, resigned, and that he held the position and acted as such Attorney-General till the October Term of the Court at Honolulu, when by W. Austin Whiting, his deputy appointed, the indictment was presented, and the motion to quash it was made.

The Court have carefully examined their decision in Banco in *Rex vs. Wm. Kanaau*, 3 Haw., 669, in which Chief Justice Harris delivered the opinion, and think they are bound by it.

In that case, John S. Walker, Minister of Finance, was appointed Attorney-General *ad interim*, and a motion similar to the motion made in this case was made and denied.

The Chief Justice says: "It is said that the Constitution contemplates that there should be four advisers to the King—Cabinet Officers—and that it is not conforming with the Constitution when two of these offices are held by one person. This may be all very true, and it may be that a prolonged neglect to fill all the offices would be a neglect to perform the duties required by the Constitution in this respect, but it by no means follows that, in case of a vacancy occurring by death or otherwise, His Majesty must fill it up precipitately, without taking time to consider, and that he cannot delegate the authority to act for the time being to another Ministerial officer, or that all or any of the functions of government must be suspended."

We believe this to be a sound exposition of the law.

It follows that Walter M. Gibson was duly appointed Attorney-General by His Majesty, and began to hold the office *de jure*. But it is now said that on this motion to quash the indictment, which is a matter between the King and people and the defendant, and to which Walter Murray Gibson is not a party, the Court by this summary process shall decide that, owing to lapse of time, he has become only Attorney-General *de facto*, and that he shall be ousted from office. We think this cannot be so done.

In *Fowler vs. Beebe, et al.*, 9 Mass., 231, 234, Parsons, C. J., says that "Mr. Smith (whose right to hold the office of Sheriff was questioned collaterally) is no party to this record, nor can he be

legally heard in the discussion of this plea; although our decision would as effectually decide on his title to the office as if he were a party. This would be judging a man unheard, contrary to natural equity and the policy of the law."

"From considerations like these arises the distinction between holding an office *de facto* and *de jure*."

"We do not decide whether he is Sheriff *de jure* of the county of Hampden or has intruded himself into the office, but as we are of opinion that he is Sheriff in fact, we hold that is sufficient."

Kent, in his Commentaries, Vol. 3, p. 295, says: "In the case of public officers who are such *de facto*, acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, etc., their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice."

In Sheehan's case, which was a motion to discharge a man on habeas corpus, who had been convicted, as he claimed, by a Court which was only a Court *de facto*: (122 Mass., 445, 446:) Gray, C. J., decides as did C. J. Parsons in the 9th Mass. case cited, and says, to decide otherwise would be "inconsistent with the convenience and security of the public," and further says: "The appropriate form of trying his right to exercise the office of a justice is by information in behalf of the commonwealth, or perhaps by action against him by the person injured."

See also 9 Mass., 234.

The doctrine of these cases as to officers *de facto* is sustained by a long line of authorities in England and America, and we have found none questioning it.

See *State vs. Carroll*, 38 Conn., 449, 454-458, where Butler, C. J., makes an exhaustive examination of English and American authorities, commencing with the case of the Abbe of Fontaine, reported in the year books in 1431, where it is believed the doctrine was first established and reported, and finds scarcely a case against it from then to the present time.

See *Woodside vs. Wagg*, 71 Maine, 207; *Brown vs. Lunt*, 87

Maine, 423, 433; *Pepin vs. Lachenmeyer*, 45 N. Y., 27, 32; *Nelson vs. The People*, 23 N. Y., 294.

These authorities are sufficient on which to overrule the exceptions.

In this case the defendant claims that he has no remedy by *quo warranto*, because the officer is the Attorney-General, and he has charge of moving for that remedy.

We are not called upon to decide now what remedy the defendant might have, but only to decide as to the validity of the remedy here sought. But the cases in 9 and 122 Mass., cited, are authority for saying that the defendant, who is aggrieved, might proceed directly to attack the officer who wrongs him.

We think he would have such a right under the Constitution. The exceptions are overruled.

W. A. Whiting, Deputy Attorney-General, for the Crown.

A. S. Hartwell, and Smith & Thurston, for prisoner.

Honolulu, January 14, 1884.

KAMALU vs. JOSEPH LOVELL.

EXCEPTIONS.

SPECIAL TERM, DECEMBER, 1888.

JUDD, C. J., McCULLY and AUSTIN, JJ.

After lapse of time, and under circumstances of assent and possession, the testimony of a grantor will not be held sufficient in law to set aside his deed.

The equitable doctrine of laches may reasonably be applied to an ejectment suit depending on the validity of a deed.

The Court need not submit the case to the jury, if there is no evidence upon which the jury can find a verdict for the party who has the burden of proof.

OPINION OF THE COURT BY McCULLY, J.

UPON a previous trial of this cause verdict was rendered for

the plaintiff. Exceptions to this finding were sustained by the Court—see *Kamalu vs. Lovell*, 4 Hawn. 601—on the ground that there was no evidence tending to attack the deed by which the defendant held, executed in 1859 and on record since 1863, and coming from the custody of the defendant's privies, except the denial of the alleged grantors, Nuuanu and his wife, joining to release dower.

Upon the ensuing trial the presiding justice ordered a verdict for the defendant. The plaintiff excepts and contends that there was evidence in corroboration of the testimony given again by Nuuanu and his wife, the grantors, denying their execution of the deed, which ought to have been submitted to the jury. We have examined the evidence as sent up in the bill of exceptions. Taking out the testimony of the grantors we find no evidence to support the plaintiff's proposition that the alleged deed was fraudulent.

The effect of the other testimony is that the alleged grantors, on returning from a visit to Honolulu, stated that they had sold their land. This was in 1855. The defendant entered into possession, claiming under that deed, in 1865. The plaintiff claims that this was a permissive and not adverse possession. This is not supported by the evidence. The plaintiff, therefore, upon the second trial made no case on which, by the ruling of the Court in Banco, a verdict for him could be sustained. The ruling that after such a lapse of time, and under the circumstances of assent and possession, the mere testimony of the grantor will not be held sufficient in law to set aside his deed, is supported by the doctrine of laches, an equitable doctrine, but which may be reasonably applied to the present case where the controversy depends on the validity of a deed.

See Story's Eq., Juris., §1520. *Smith vs. Clay*, 3 Brown Lead. Cases, 639. *Norris vs. Labree*, 58 Me., 260. *Evart vs. Bacon*, 99 Mass., 215. *Conant vs. Perkins*, 107 Mass., 71.

If a verdict for the plaintiff must have been set aside again, *cui bono* to leave it to the jury to determine the verdict. The authority of the Court to order a verdict is set forth by Mr. Justice Clifford, delivering the opinion of the Supreme Court in *Commissioners vs. Clark*, 94 U. S. Supreme Court, at p. 284. He says,

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

The plaintiff had trial of his case under the ruling, and the Court properly instructed the jury to find verdict for the defendant.

The exceptions are overruled.

S. B. Dole, for plaintiff.

W. R. Castle, for defendant.

Honolulu, January 15, 1884.

THE KING *vs.* MAKAWEO.

EXCEPTIONS FROM CIRCUIT COURT, THIRD JUDICIAL CIRCUIT.

SPECIAL TERM, DECEMBER, 1888.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Where the prosecuting witness, after the trial, paid for the dinner of some of the jurors, at their request; held not to be misconduct of sufficient gravity to vitiate the verdict.

Kalaeokekoi vs. Kahanu, 4 Haw., 431, distinguished.

Cause of a juror's hostility, if known to defendant, must be made a ground of challenge before the juror is sworn.

New trial refused.

OPINION OF THE COURT PER JUDD, C. J.

THE prisoner was found guilty, at the November Term of the Circuit Court for the Third Judicial Circuit, of the crime of robbery in the second degree.

His counsel now moves the Supreme Court for a new trial on three grounds :

First—That the verdict was contrary to the evidence.

Second—That there was misconduct on the part of the jury.

Third—That a juror was disqualified.

The first ground was abandoned at the argument.

The alleged misconduct of the jury is supported by affidavits of the jurymen. The jurymen substantially reciting that shortly after they had rendered their verdict, five of the jury went to a Chinese restaurant near by and took dinner; after dinner the affiant was about paying for his meal, when a jurymen, Kanehaku, said, "Don't you pay; let the Chinaman whom we have vindicated pay," meaning the prosecuting witness, who had been robbed. The affiant replied that this was improper, and paid for his own dinner.

David Hoakimoa says he was not one of the jury, but he was writing in the restaurant when some of the jurymen came into the dining-room, and one of them, Waipuilani, called to the cook to serve them with dinner. The cook asked, "How many are there of you?" The jurymen answered, "Six of us." He then asked, "Who is to pay?" The jurymen replied, "The Ookala Chinaman who was robbed will pay, because he is cleared, and we have convicted the native." Another Chinaman standing by said, "That is all right," and they were served, and the Chinaman who had been robbed handed the restaurant keeper \$1.50. The affidavit of the last affiant's wife is to the same effect. Ah Wi, a Chinaman, deposes that he was employed in the Chinese restaurant, and that seven jurymen came to the restaurant and asked for dinner. "I asked who was to pay, and they said the Chinaman from Ookala, who was robbed, and he did pay. Afterwards one of the jurymen came and paid me twenty-five cents, saying that he did not want the Chinaman to pay for him."

Kanehaku swears to a counter affidavit, and says he was one of

the jurymen who tried Makaweo, and went to the restaurant in question, dined and paid for his own meal; that he did say that the Chinaman who had been robbed ought to pay for the dinner of the jurymen, but that Luhiau said that it was improper, and he and Luhiau paid for their meals themselves, and that the said prosecuting witness did not, before or after the trial or at any time, offer to pay, nor did he ever pay, any money on account of affiant at the said restaurant. That his statement that the Chinaman ought to pay was made only to Luhiau.

Waipuilani swears that he went to the restaurant, dined and paid for his meal himself, and that he was not invited by the Chinaman to dine at his expense, and never spoke to him before or after the trial.

The statement was undoubtedly made by Kanehaku, at the restaurant, that the prosecuting witness in the case of the defendant ought to pay for their dinner. But he and Waipuilani, whom the affiants on the part of the defendant especially implicate, emphatically deny that they allowed him to pay for their meals, or that he offered so to do, and say that they paid for their meals themselves. But the affidavits of Hoakimoa and wife and the restaurant hand are uncontradicted that the prosecuting witness in the case did pay for certain other jurors' meals. A proper sense of honor should have prevented the jurors accepting this favor, and if it had been seasonably brought to the notice of the Court it would have subjected them to reprimand, but it does not seem to us to be misconduct of sufficient gravity to vitiate the verdict.

The thought, no doubt, originated in the juror who called out that the Chinaman ought to treat the jury to dinner, and the ignorant Chinaman no doubt thought he ought to do so, and did pay for some of them.

The case of *Kalaeokekoi vs. Kahanu*, 4 Haw., 431, is cited, where the Court ordered a new trial. In that case the intoxication of a juror was sufficient upon which to set aside the verdict, but the Court could not put out of sight the gross offense against the dignity and purity of jury trials by the successful defendant inviting the whole jury, before they had left the court-room, to dine at his expense.

As regards the third point. The affidavits show that one Bola-bola, who was drawn on the jury in this case, had expressed an opinion before the trial, unfavorable to the prisoner, saying that he had led astray his (the affiant's) foster child, and was living with her. The prisoner makes affidavit that he was ignorant of this statement of the juror, or that he was prejudiced against him; but the prisoner does not say whether the fact that he had led astray the juror's foster daughter, and was living with her, was true or not. It is evident that the cause of hostility must, if true, have been known to the prisoner, and it was his duty to have challenged the juror on that ground before he was sworn.

New trial refused.

W. A. Whiting, Deputy Attorney General, for the Crown.

W. A. Kinney and *C. Brown*, for defendant.

Honolulu, January 16, 1884.

WM. BROWN *vs.* KOLOA SUGAR CO.

EXCEPTIONS FROM JUDGMENT OF AUSTIN, J., ON DEMURRER.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Where a complaint in an action on a contract was demurred to because the contract was verbal and not to be performed within a year; held that it must affirmatively appear from the contract and surrounding circumstances that it could not be performed in a year.

If defendant assisted plaintiff and advanced him money, and the contract could be performed within a year from the last assistance rendered, the assistance may be construed as a reassertion of the contract.

Judgment affirmed.

OPINION OF THE FULL COURT BY AUSTIN, J.

THIS case is here on exceptions from a decision below, over-

ruling a demurrer made to the complaint in an action on contract, on the ground that the contract was not in writing, and was therefore invalid, because its terms showed it could not be performed within one year.

The Court refer to and adopt the opinion in the Court below ; and further say that the acts of the defendant as alleged, in furnishing seed cane and a plow and money to aid the plaintiff in the planting and cultivation of the sugar cane, for the failure to grind which the plaintiff seeks damages, may properly be construed as a reassertion of the contract at the time the last of such advances were made ; and that, if from that time the contract could possibly be performed within a year, the statute of frauds does not apply.

Exceptions are overruled, with leave to the defendants to answer in twenty days.

S. B. Dole, for plaintiff.

Smith & Thurston, for defendants.

Honolulu, January 24, 1884.

OPINION OF AUSTIN, J., BELOW.

A demurrer is interposed to the complaint in the case upon the ground that it shows upon its face that the contract, for breach of which damages are claimed, is not to be performed within one year from the making thereof, and is therefore void under the Statute of Frauds. Civil Code, Section 1053, subdivision 5.

The allegations in the complaint are not very definite, but upon demurrer no advantage can be taken of that.

The exact time of making the contract is not stated, but it is averred that it was made in 1880 and 1881. This includes all of 1881. It is alleged that the parties agreed that the plaintiff should plant sugar cane on his available land in Koloa, amounting to eight acres, more or less, to be ground and manufactured into sugar at defendant's sugar works in Koloa, and that defendant would, at a suitable time after the same had matured, haul the said cane from the plaintiff's land to defendant's mill, and manufacture the same into sugar, at a charge of one half the sugar and molasses, the product of said cane.

This is the whole contract as alleged.

The plaintiff further alleges that, in pursuance of the contract, three acres were planted in 1881, and subsequently, in 1881 and 1882, a second piece of land of about five acres was planted, and that the defendant furnished seed cane for all the planting, and for the second piece furnished a plow and made advances of money, and that about January, 1883, when the first field was mature and in good condition to be ground, the defendant refused to grind it, or any part of plaintiff's cane.

In Sec. 279 of Brown on the Statute of Frauds, it is said :

"The statute provides simply that if the contract does by its terms expressed, or from the situation of the parties, reasonably implied, require more than a year for its performance, they must put it in writing. In other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making."

This I believe to embody the rule, as derived from the cases cited by the counsel for both parties, and I shall decide the case by that rule.

Manifestly, although the first field planted was but three acres, yet if sufficient labor had been applied, the whole eight acres might have been planted at about the same time. The fact that five acres were subsequently planted, and are not yet ripe, does not affect the validity of the contract. The contract is not rendered void by the long delay in execution, if, as matter of fact, it might, in the nature of things, be completed within the year.

There is nothing alleged to show but that the eight acres might have been planted, matured, cut and ground within a year from the making of the contract. If that could be done, the contract was a valid one; if not, then it was void. I cannot hold it void upon this pleading.

If there should be a trial, and it should then be proved that a crop could not be planted and harvested in a year, it would be a defense.

The demurrer is overruled, with leave to answer in ten days.

Dated, October 5, 1883.

L. WAY *vs.* CHAS. T. GULICK, Minister of Interior.

APPEAL FROM DECISION OF AUSTIN, J., SUSTAINING DEMURRER.

. SPECIAL TERM, DECEMBER, 1888.

JUDD, C. J., McCULLY AND AUSTIN, JJ.

By Section 191 of the Civil Code it is provided that "The Minister of
" the Interior shall have the general charge of the pipes or con-
" duits of water to supply the town and harbor of Honolulu. He
" may from time to time regulate the rates of supply to ships, and
" to parties on shore, and establish all such rules as may be need-
" ful for the public interests."

Held, affirming the decision of Austin, J., that the supplying or with-
holding water for public and private use rests in the discretion of
the Minister: and in the exercise of that discretion he is not liable,
at the suit of a private citizen, for damage caused by insufficient
water supply at a fire.

OPINION OF AUSTIN, J., APPEALED FROM.

The defendant demurs to the plaintiff's complaint as containing
no cause of action.

The complaint alleges that the plaintiff sustained \$6,000 dam-
ages from a fire which destroyed his buildings, and which dam-
ages were caused by the failure and neglect of the predecessor in
office of the defendant to provide a supply of water in the water
pipes of the Water Works of Honolulu in the vicinity of the fire
at the time it occurred.

The complaint alleges that it was the duty of the Minister of
the Interior to furnish such supply of water at the time of the fire.

The action in this case is substantially for the purpose of trying
to hold the Government liable for the damages claimed, and is
brought by permission accorded under Section 829 of the Civil
Code. Doubtless, as has occurred in this case, the Government in
the exercise of a wise and liberal discretion ought always to grant
a right of action to any resident of the country conceiving himself
aggrieved, but the recovery in any such case must be governed by
legal rules.

There are no municipalities in this country, but the duties and responsibilities which are assumed by and imposed upon the Minister of the Interior, relative to the internal affairs of the country, are similar to those which pertain to municipalities in other countries.

The strongest position that the plaintiff can take in favor of his recovery is to claim that there is an analogy between the duties of the defendant and those of municipalities elsewhere, and I am not prepared now to deny that there is such an analogy, and that where a municipality elsewhere would be liable, the defendant here might also be liable.

No question like this has been decided in our courts. It should therefore be decided by construing our statutes in the light of foreign authorities.

Dillon on Municipal Corporations, Sec. 753, 3d Ed., 949, says: "A municipal corporation is not liable to an action of damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character."

This summary of the law on this point has been upheld and established by numerous authorities in the highest courts of New York, Massachusetts, North Carolina, Alabama, Mississippi, Michigan, Ohio, Pennsylvania, Louisiana, Wisconsin and Illinois, as cited in note 3 to the section above quoted from, and is questioned in no authority that I have found.

If we apply this principle to the case at bar, I think it will lead us to its proper determination.

The only statutes which refer to the matter are Sections 191 and 192 of the Civil Code, which are as follows: "The Minister of the Interior shall have the general charge of the pipes or conduits of water to supply the town and harbor of Honolulu. He may, from time to time, regulate the rates of supply to ships, and to parties on shore, and establish all such rules as may be needful for the public interests."

Sec. 192: "The said Minister shall appoint some discreet and capable person to be Superintendent of Water Works, whose duty it shall be to keep the conduits or pipes for the conveyance of water in repair, collect all water rates from ships and persons in

Honolulu or its vicinity, and perform such other duties in connection therewith as the said Minister may prescribe."

These sections establish beyond controversy, I think, that the withholding or supplying of water for public or private uses, rests in the discretion of the Minister of the Interior, and for the exercise of that discretion, whether rightly or wrongly exercised, he is not, nor is the Government, responsible.

As matter of fact, many times in cities everywhere where water-works are established, a wise discretion leads to the temporary shutting off of the water supply in localities, and sometimes in large sections of cities. If, during such temporary withdrawal of the water, fires should unfortunately occur, without referring to the decisions, it would be unreasonable and disastrous and unbearable to hold the municipality liable for the losses which should occur.

If the Minister of the Interior or the superintendent appointed by him should act with gross negligence or corruption, in regard to furnishing the water supply, it would be malfeasance or non-feasance in office for which they might be impeached or indicted, but there would be no remedy for the citizen in private damages.

A municipal corporation owning water-works which supply private consumers on the payment of water rent, it has been held, is not liable to the latter for negligently laying its mains too near the surface of the ground so that they are frozen, whereby the water is cut off.

See Dillon on Municipal Corporations 8d Ed., Sec. 954: *Smith vs. Philadelphia*, 81 Penn. 38, reported in 22 American R. 78.

Frost does not occur in this country, but if for any cause, negligent or otherwise, the water is cut off, personal and private remedies cannot be obtained.

Many other analogous cases are found in the books, and have been cited by the learned counsel for the defendant.

The case of *Taintor vs. The City of Worcester*, 123 Mass. 311, is directly in point. The city cut off the water from the building of one who failed to pay his water rates, and also from a hydrant in a street near by, although the water might have been cut off from the building alone.

The building was destroyed by a fire which might have been

extinguished had there been water in the hydrant. Held that the owner of the building could not recover for the loss.

Many other authorities are cited in this case which sustain a kindred doctrine.

See also Dillon Id. Sec. (774), 976, 3d Ed. In *Hill vs. Boston*, 122 Mass. 344, all the cases on this point are exhaustively considered, both in England and America, and not one is cited which would sustain a recovery by the plaintiff in the case at bar.

In all instances where recoveries have been had for neglect or malfeasance of a public officer, the duties cast upon him have been ministerial; that is, "absolute, certain, and imperative;" no such duties devolved upon the defendant in this case, and so he is not liable, and the demurrer must be sustained.

JANUARY 24, 1884. BY THE FULL COURT:

We adopt the opinion of Austin, J., and confirm the decision appealed from.

S. B. Dole, for plaintiff.

W. A. Whiting, for defendant.

R. GRIEVE et al. vs. CHAS. T. GULICK, Minister of Interior.

MANDAMUS. ON APPEAL FROM AUSTIN, J.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J., McCULLY and AUSTIN, JJ.

Mandamus lies to compel the Minister of the Interior to present to the King in Privy Council a petition for a charter of incorporation, that being a matter in which the statute does not allow him discretion.

Judd, C. J., dissenting.

OPINION OF A MAJORITY OF THE COURT, BY AUSTIN, J.

THIS case comes here on appeal from a judgment allowing a peremptory mandamus against the defendant, requiring him to

present to the King in Privy Council the plaintiffs' petition for a charter of incorporation.

Section 1442 of the Civil Code provides that "The Minister of the Interior shall have full power, subject to the provisions of this Chapter, in his discretion, by and with the advice and consent of the King in Privy Council, to grant charters of incorporation."

The Minister, then, has no discretion to grant a charter, except with the King's advice and consent. The King in Privy Council may veto it. That is, a discretion to grant a charter rests in the King and Minister, the King being in Privy Council. But the discretion to grant a charter, by this Section, necessarily includes the discretion to refuse a charter, and this right also rests in the Minister by and with the advice and consent of the King in Privy Council. In any case where, upon this joint action, a charter is not granted, it is refused. The only power of refusal which rests anywhere by the Section, is to be inferred or implied from the power to grant.

In that refusal the Minister necessarily takes part with the King in Privy Council. He has no other discretion to refuse, and none is provided for anywhere. He cannot refuse alone any more than he can grant alone. The Section must be construed as though it read, "The Minister shall have full power in his discretion, by and with the advice and consent of the King in Privy Council, to grant (or refuse) charters of incorporation."

Section 10 of Chapter 3 of the Civil Code provides "Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning."

Section 12 provides "One of the most effectual ways of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it."

Section 13 provides, "When the words of a law are ambiguous, every construction which leads to an absurdity should be rejected."

These are wise rules, and are epitomes of the rules of construction universally adopted in England and America.

If there were any doubt of the foregoing construction of Sec. 1442, the application of these rules will dissipate it.

The object of Chapter XXXI, on corporations, is to promote the industrial enterprises of the country, by allowing the massing of capital in corporate bodies under proper restrictions.

Section 1445 provides for an application for a charter to the Minister of the Interior, by written petition accompanied by proofs that three-fourths of the shares have been subscribed for, and setting forth in detail the objects of the corporation, its location, the amount of stock, if a stock company, and all other incidents attached to it.

If upon such a petition being presented, the Minister of the Interior may suppress it without explanation, and never present it to the King in Privy Council, he may, at his own will, without cause, practically destroy this beneficent statute. The Legislature did not so intend. They intended that every such petition should be presented to the King in Privy Council, and there be passed upon for acceptance or rejection. If it had been intended that the Minister should have the right of private suppression of a charter, the Legislature would have expressly so provided.

Section 1441 provides for annual reports by corporations to the Minister of the Interior, and for examinations under oath, and then says: "The annual reports above mentioned, and the results of such examination, the Minister may, *in his discretion*, lay before the King in Privy Council, and also publish."

Had the Legislature intended that the Minister should have a discretion about laying before the King in Privy Council the original petition for a charter, they would have made a provision for it similar to the one just quoted.

Defendant's counsel refer to Section 1448, as illustrating their definition of a relative discretion.

This Section says: "The Minister of the Interior, with the consent of the King in Privy Council, shall also have power, on the expiration of any charter, to renew the same, on application to him for that purpose by two-thirds of the stockholders of such company, and a satisfactory explanation to him of the state of its affairs."

The defendant's counsel say, that upon a satisfactory showing

of the company's affairs, "the power of discretion of acting, refusing or granting ceases upon such a showing being made, and the duty becomes imperative."

We think this is so, if the "King in Privy Council consent," otherwise not, and the King in Privy Council *may refuse*. It is no more a case of relative discretion than Sec. 1442. And the defendant's counsel do not pretend that the Minister can escape the duty of presenting the application for renewal to the King in Privy Council; and yet there is no direct provision that he shall present it. If the Minister does not wish to renew the charter, why not suppress it, as it is said he may the original charter by Sec. 1442.

The counsel for the defendant say: "Again, suppose the application be for a charter for illegal or seditious purposes, the Minister would reject it immediately"; and they say "this is an exercise of discretion." The answer to this is that if such were the nature of the petition, it would manifestly be a petition not in compliance with the law. It would be rejected because not formally in accordance with Sections 1442 and 1445 of the Statute. The examination of an application to see whether it is formal is not an exercise of discretion. There are no two ways of deciding that question, and its decision is the mere exercise of a clerical duty.

When it is found to be formal, thereafter, at the time the Statute prescribes, the right to exercise discretion arises.

Sec. 1445 prescribes a form of petition, and it is upon such a petition and no other that the discretion to grant or reject is to be exercised.

See *Bailey vs. Ewart*, 52 Iowa, 111, 112; *Howland vs. Eldredge*, 43 N. Y., 357; *San Francisco Gas Company vs. Supervisors*, 11 Cal., 42; *Carpenter vs. County Commissioners*, 21 Pick., 258.

The manifest intention of the Legislature was to refer the important matter of granting or refusing a charter to the King in Privy Council, where he has the aid not only of the Council, but of his entire Cabinet (including the Minister of the Interior) who are *ex officio* members of that council. Any other construction of the law would make of His Majesty a cipher, instead of treating him, as the Constitution declares, as the executive power of the Government.

The view that after the matter reaches the King in Privy Council, the Minister has no separate discretion, is in accord with the argument of the defendant's counsel.

We have examined many of the cases cited by the defendant's counsel defining and describing what is meant by discretion. We have found none which show the act commanded here to be an act resting in the Minister's discretion.

In the case of *Castle et al. vs. Kapena*, Minister of Finance, *ante*, page 27, we have held that a mandamus may issue against a Cabinet Minister. Upon the questions not considered herein, and upon the whole case, we refer to and adopt the opinion of the Court below.

The judgment is affirmed with costs.

DISSENTING OPINION OF CHIEF JUSTICE JUDD.

I think the law ought to be as laid down by my learned associates. It should not be in the power of one man to prevent at his caprice the incorporating of business enterprises. But the words of the statute seem to me to confer this power on the Minister of Interior. I think they give the Minister the authority to use his discretion in refusing to grant a charter, and this implies that he may refuse to present the application for the consideration of His Majesty in Privy Council. For it would be presumptuous in him and disrespectful to His Majesty to exercise this discretion and refuse to issue a charter *after* His Majesty in Privy Council had authorized him to issue it. His discretion must be exercised, if at all, before the application goes to the Privy Council. The question is not without doubt, and I am much impressed with the reasoning of the decision of the majority of the court, but it seems to me that the interpretation therein put upon the Statute has the effect of altogether striking therefrom the words "in his discretion."

As to the amenability of a Cabinet Minister of this Kingdom to the Writ of Mandamus, to compel the execution of a duty not discretionary, I fully agree with my brethren.

But as I think the Minister has a discretion vested in him by the Statute, I am obliged to dissent.

A. S. Hartwell and Smith & Thurston, for Petitioners.

Attorney-General Neumann and W. A. Whiting, for Respondent.

Honolulu, February 21, 1884.

OPINION OF THE COURT BELOW BY AUSTIN, J.

This case arises on a return to an order, issued on the plaintiffs' sworn petition, to show cause why a writ of mandamus should not issue to the defendant, requiring him to present to the King in Privy Council the plaintiffs' petition for a charter of incorporation.

The return consists of a demurrer based upon three grounds. The first ground is technical, and I shall now consider it. It is alleged that the petition fails to show a demand and refusal by the defendant to do the act required of him, and the defendant's counsel claims that this is fatal to the demand for a mandamus. I have no doubt, after examining the authorities cited by the counsel on both sides, that a substantial demand and refusal must be shown.

See Tapping on Mandamus, pp. 332 to 336, and the authorities cited.

As to the point that a demand should be shown, the petition alleges that the plaintiffs, in April, 1883, filed in the office of the Minister of the Department of the Interior a petition praying for a charter of incorporation to be issued to the plaintiffs, and that they might be constituted a body corporate under the corporate name of the Hawaiian Gazette Company; and also filed the several certificates as required by the statutes thereto appertaining, together with the form of a charter desired by the plaintiffs. Had the petition alleged in addition that the petition praying for a charter had been presented to the defendant personally, the allegation of a demand would have been surely complete.

In this case was not the filing of the petition in the defendant's department equivalent to a personal demand, unless the defendant answers that he never saw or heard of it?

This branch of the demurrer rests upon the idea that upon demand it would be the duty of the defendant to present the petition for a charter. I am inclined to believe that the filing such petition in the defendant's office as Minister of the department was a demand that it be presented, sufficient to call upon the defendant to act. I think the defendant may be presumed to have personal knowledge of such a petition filed in his department office.

High on Extraordinary Remedies, Sec. 41, says: It has been held that "Where the duty is plain and specific relating to an act which the law requires of public officers, no demand is necessary."

If I should hold on the merits that it is the public duty of the defendant to present petitions for charters to the King in Privy Council, then the filing of a proper petition as alleged, I think, would impose the duty of presentation upon the defendant. As to the point that there should be a refusal shown, the allegation is that more than sufficient time has elapsed wherein to enable the defendant to present said petition, that numerous meetings of the Privy Council have been held since the filing of said petition, but the defendant has "utterly failed and refused, and now fails and refuses to present said petition to the King in Privy Council."

This is direct as to refusal.

Tapping on Mandamus, pp. 334-5, says: "There should be enough from the whole of the facts to show to the Court that for some improper reason compliance is withheld and a distinct determination not to do what is required."

These allegations show that, provided the duty of presentation rested upon the defendant at all.

Further: the allegation of refusal is of a refusal to present the petition described, which in itself was a direct prayer to the defendant to issue the charter sought. He could not refuse to present it without knowing its contents, and if he knew them and refused, I think the demand and refusal complete.

If the petition is true, there can be no question that the defendant, with perfect knowledge of the prayer for a charter, refused to present it to the King in Privy Council. I hold that this is sufficient under the authorities cited.

See *King vs. Canal Company*, 3 Ad. & Ell., 217. High on Extraordinary Legal Remedies, Sec. 13. *O. and V. R. R. Company vs. Plumas County*, 37 Cal., 354.

I shall now consider the second and third grounds of the demurrer, which are on the merits.

These grounds are in substance that the Court cannot grant a mandamus because there is no law or statute, as claimed, which requires the defendant to present the prayer for a charter to the King in Privy Council, and that whether such prayer shall be so

presented rests in the judgment and discretion of the defendant, and this Court cannot command him to present it.

The authorities are ample to show, and it is conceded by the plaintiffs' counsel, that if the act of presentation asked is a matter vested by law in the judgment and discretion of the defendant, the writ of mandamus cannot be issued.

In one branch of the argument of the counsel for the defendant they claim, though inconsistent with other parts of it, that it is doubtful whether the Court has the power to issue a mandamus against the defendant at all, because he is the head of a Government department. Though formerly a prerogative writ and not one of strict right in England, yet practically now even there the issuing of it is a matter of strict right based upon well-settled principles of law, which are not departed from, and in the United States the writ has always been one of strict right. In this country, which, like the United States and unlike England, has a written constitution which governs King and people, the issuing of the writ is matter of strict right upon fixed rules of law.

In England it has been held that no writ of mandamus could be issued by any court against the King or Queen.

In the case of the *State of Mississippi vs. Johnson*, in the United States Supreme Court, where an injunction was sought against the President of the United States to restrain him from carrying out certain laws claimed to be unconstitutional (4 Wall., 98), Chief Justice Chase said: "We shall limit our inquiry to the question presented by the objection (that the duty involved is matter of discretion), without expressing any opinion on the broader issues discussed in argument, whether in any case the President of the United States may be required by the process of this Court to perform a purely ministerial act under a positive law, or may be held amenable otherwise than by impeachment for crime."

In this country I think if an injunction or a mandamus were asked against His Majesty, that it ought probably to be denied.

It is stated by High, in his work on Extraordinary Legal Remedies, Sec. 119, that in the States of Ohio, Alabama, California, Maryland and North Carolina, the courts of last resort have held that mandamus will lie to compel the performance of ministerial duties by the Governor of the State. The opinions quoted from to sustain this view seem to be based on sound principles.

However, High, in Sec. 120, says that the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey and Rhode Island, have held that no mandamus could issue against the Governor of a State in any case.

The question, therefore, of the amenability of the supreme head of a State or country to the law of mandamus is strongly mooted and must be considered in doubt.

But that is not the question here; and in many cases, and almost or quite universally, it is held, both in England and America, that a head of department, including the Secretary of State, the Secretary of the Treasury, the Secretary of the Interior and the Secretary of the Navy, in the United States, can be compelled by mandamus to perform purely ministerial acts enjoined upon him by law.

In the case of *Marbury vs. Madison*, 1 Cranch, 137, decided in February, 1803, Chief Justice Marshall said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

In these clear words he struck the keynote of all that has been decided since on this point by the Supreme Court of the United States, and in that case it was held that James Madison, the Secretary of State, should deliver to William Marbury his commission as a Justice of the Peace of the County of Washington, in the District of Columbia, to which he was entitled by law, and which, being in the custody of the Secretary, he was bound to deliver in the exercise of a purely ministerial duty.

The question then is, and the counsel for the defendant having seemingly denied, at last admits it, whether the act required by the plaintiffs of the defendant in this case is a purely ministerial act which the law requires him to perform, or an act resting in his judgment and discretion, and it is admitted that if the act required is ministerial, a mandamus must issue.

I shall now address myself to this question. It has been well and fully argued by the counsel on both sides, and the law cited is amply sufficient to furnish a basis for its decision.

Article 13 of the Constitution provides as follows:

"The King conducts His Government for the common good,

and not for the profit, honor or private interest of any one man, family or class of men among His subjects."

Article 14 provides:

"Each member of society has a right to be protected in the enjoyment of his life, liberty and property according to law."

Sec. 34 of the Civil Code provides that "It shall be the duty of the Minister of the Interior to faithfully and impartially execute the duties assigned by law to his department."

Sec. 1442 of the Civil Code is as follows: "The Minister of the Interior shall have full power, subject to the provisions and conditions of this chapter, in his discretion, by and with the advice and consent of the King in Privy Council, to grant charters of incorporation for agricultural, commercial and manufacturing purposes, and for cemetery associations, as well as to charter other incorporations, either aggregate or sole, ecclesiastical or lay, banking and municipal corporations alone excepted, which shall be chartered only by the Legislature."

These are all the statutes which directly relate to the question at issue.

It is claimed that by the latter section the defendant has a discretion as to whether or not he will present a prayer for a charter to the King in Privy Council. Inasmuch as the section does not so say, I am unable to believe that it can be so construed.

The only discretion of which the section speaks is a discretion to be exercised *by and with the advice and consent of the King in Privy Council*. Until he has placed himself in a position to receive that advice and consent, under the section, he can exercise no discretion. If, then, he rejects the petition and declines to grant the charter, or if he grants it without presentation, he has of his own motion, without the King's advice and consent, as required by the statute, assumed to exercise a discretion which he does not possess.

There is no escape from this conclusion. If there is, then the King's Minister of the Interior might suppress, as in the case at bar, without informing His Majesty, every prayer for a charter which should be presented by his people, and the statute relative to corporations would become utterly useless; or, if operative, it would be practically to strike out from the King's constitution

that golden Section 13, which I have quoted, and the granting of which by his just predecessor covers him with honor.

The law is no respecter of persons. I have no doubt, as a member of His Majesty's highest Court, that he has every disposition fairly and impartially to carry out the law.

Without the examination of authorities I have no doubt, upon plain reason, under the sections of the Code referred to, and in accordance with the provisions of the Constitution, that the Minister of the Interior, on the filing of a prayer for a charter, is bound to put himself in the position to exercise the discretion to grant or refuse it, and this he can only do by presenting it to the King in Privy Council.

But the authorities are abundant to show that an officer who has a discretion may be compelled to exercise that discretion as the law requires, and that is all that the plaintiffs ask in this case.

Tapping, on *Mandamus*, says, side page 14: "So, where one is to act according to his discretion, and he will not act nor even consider the matter, the Court will by *mandamus* command him to put himself in motion to do it."

Many English authorities are referred to. The principle is well settled and unquestioned.

See also side page 117; and *Bailey vs. Ewart*, 52 Iowa, 112; *Howland vs. Eldredge*, 43 N. Y., 457; *San Francisco Gas Company vs. Supervisors*, 11 Cal., 42; *Carpenter vs. Commissioners of Bristol*, 21 Pick., 258.

The case of *Ludington vs. The Minister of the Interior* (in 1867, not reported) was cited by the defense, and I have examined it. It in no way conflicts with the views I have taken herein.

The right of prayer for a charter in accordance with a law duly enacted is a valuable right, concerning property.

It is secured to the plaintiffs by Section 14 of the Constitution, which I have quoted.

This right has been substantially denied to them by the defendant, and for its enforcement they have no other remedy than that sought in this case.

Let a *mandamus* issue to the defendant in accordance with the prayer of the petition.

Dated December 14, 1888.

CHULAN & CO. vs. PRINCEVILLE PLANTATION CO.**APPEAL FROM THE DECISION OF McCULLY, J.****SPECIAL TERM, DECEMBER, 1883.****JUDD, C. J.; McCULLY and AUSTIN, JJ.**

By an agreement made between the defendants and the plaintiffs, the defendants agreed to rent to the plaintiffs certain rice lands, containing from 300 to 700 acres, for a term of five years, and to put the plaintiffs in possession of all over 300 acres when the plaintiffs' manager should elect; the rent to be at the rate of \$20 per acre. The agreement contained a stipulation that a lease in duplicate should be thereafter executed.

Held that the plaintiffs were bound to pay rent for all lands delivered to and accepted by them suitable for rice cultivation.

Held also that interest was recoverable, from the date of the writ, on the amount of rent then due, and to become due, on the acreage for which the plaintiffs were liable to pay.

OPINION OF THE COURT, BY JUDD, C. J.

The bill of complaint avers that the defendant corporation made an agreement with the plaintiffs, dated March 1, 1880, which is as follows:

"Whereas, the Princeville Plantation, a corporation only (duly organized under and by virtue of the laws of the Hawaiian Kingdom, has agreed to rent to Chulan & Co., merchants, doing business in Honolulu, Oahu, certain lands situate in Hanalei, Island of Kauai, for the purpose of cultivating rice, and the said Princeville Plantation Company and the said Chulan & Co. do hereby agree to sign, seal and execute a lease in duplicate, to be hereafter prepared upon the terms and conditions as are hereafter named and expressed. The Princeville Plantation Company agree to lease from 300 to 700 acres of land, to be used only in the cultivation of rice, at said Hanalei, and put Chulan & Co., or their agents, in possession of all lands over 300 acres as soon as the manager elects to do so, the 300 acres to be taken possession of immediately, for the term of five years, with a privilege of an extension of the said lease for a further period of five

years, upon the same terms and conditions of the present lease, at the yearly rental of \$20 per acre, payable quarterly. Also, that the Plantation Company will not lease any other land in Hanalei Valley, for the purpose of cultivating rice, to any person or persons, without the consent of Chulan & Co.; also, to allow said Chulan & Co. to cut deadwood from lands owned or controlled by the Plantation Company for fencing, posts and household purposes, but such cutting shall be done under the management and control of the Manager of the Plantation Company; also, to furnish all the water necessary for the cultivation of said land with rice; also, pasturage upon the lands owned or controlled by the Plantation Company for the horses and cattle of Chulan & Co. used in working and cultivating the land; also, that in every 100 acres of land, two acres shall be allowed, rent free, for erection of houses for Chulan & Co.'s laborers; that said Chulan & Co. shall not sublet or assign the lands, or any part thereof, without the consent, in writing, of said Plantation Company, nor in any manner interfere with the Plantation labor; also, that the rent of the 300 acres shall commence on the 1st day of April, 1880, and the balance of said land, up to 700, from date of possession being given. In witness whereof," etc.

That, pursuant to this agreement, defendant, by its agent, C. Koelling, about 1st April, delivered to plaintiffs, and plaintiffs took possession of all land marked on a map (Rowell's) 1, 2, 3, 5 6, 7, and defendant stated to plaintiffs it was of the area of 300 acres, and demanded rent therefor. That defendant, about 1st July, 1880, delivered to plaintiffs, and plaintiffs took possession of, lot 4, on said map, and stated that the area was 55½ acres, and also that certain other pieces, then delivered, contained 8.08 acres, and demanded rent. That plaintiff paid the rent, believing that the statements were true, to 1st April, 1882. That no survey of the premises was made at the time of agreement. That plaintiffs enclosed the land with a fence when it was delivered to them, and the fence now encloses all the land at any time in their possession. Plaintiffs suspected, from the low yield, that the acreage under cultivation was less than was stated by defendant, and caused a survey to be made, by which it appears only 303.06 acres were in their possession. That then

plaintiffs refused to pay rent, as claimed by defendant, on 363.58 acres, but offered to pay on 303.06 acres, and demanded of defendant repayment of the excess of rent paid. Defendant refused to accept the rent offered or to pay back the excess, and brought action in the District Court to recover possession of the premises for non-payment of rent. The bill prays that defendant be ordered to execute a lease for 303.06, or such number of acres as the Court may find to be in plaintiffs' possession, and to order the defendant to pay back the excess of rent, and to accept the arrears of rent due on the basis of 303.06 acres; for an injunction against the suit, and general relief.

The answer admits the agreement, and alleges, in substance, that defendant delivered, March, 1880, to plaintiffs 339½ acres of rice land, but plaintiffs being dissatisfied with 24 acres thereof, as unsuitable for rice, defendant took them back, leaving 315½ acres in plaintiffs' possession; that July 1st, 1880, they delivered plaintiffs another tract of 55½ acres, and that then plaintiffs had 371 acres; deducting two acres per hundred, as per agreement, there would remain 363.58 acres, on which rent had been demanded and paid to April 1st, 1882.

That a survey was made before any of the premises were delivered, and that when possession was given, the boundaries were pointed out by Monsarrat and Koelling, and that plaintiffs accepted Monsarrat's survey; and denies that plaintiffs' survey shows the area of land kept in possession by them, and avers that a large portion of the land so delivered suitable for rice culture, has not been planted; that defendant has offered to take back certain portions of land left idle by plaintiffs, but they refused to surrender the same, and other formal matters are denied.

The rights of the parties hereto are to be determined by the agreement, and it seems to us that it ought to be construed as a lease. It transfers the possession of the land, stipulates the annual rent payable per acre, and contains the covenants and conditions agreed upon. The rent of the 300 acres was to begin 1st April, 1880, and for the remainder, up to 700 acres, from date of possession given.

Taylor's Landlord and Tenant, Sec. 43, reads: "From a consideration of the cases the rule would appear to be, that if the

instrument professing to be an agreement for a lease is itself a transfer of possession, whether immediate or *in futuro*, it is a lease, although it contains a stipulation for executing a subsequent lease." For the "300 acres to be taken possession of immediately," it seems to be admitted by the plaintiffs that the agreement was a lease. The plaintiffs urge that there is no tenancy between the parties established by the agreement beyond this area of land, and that they are only liable, for use and occupation, for the amount of land over 300 acres actually occupied by them. The defendant claims that the plaintiffs should be holden for rent of whatever land over the 300 acres was delivered to the plaintiffs.

We think the plaintiffs are bound to pay rent for whatever land was delivered by the defendant and accepted by the plaintiffs, without reference as to whether the same was thereafter planted or not by plaintiffs. This must, however, be qualified. The land must be such as is suitable for rice culture. The land was to be "used only in the cultivation of rice," and this implies that it was to be rice land, capable, by an ordinary expenditure of money in preparation, of growing rice. The plaintiffs were not bound to take land which, with an extraordinary expenditure of labor and money, might possibly be made to grow rice, but land reasonably level, so as to be easily laid out in patches and capable of being put under water as required. That the agreement was so understood by the parties is evident from the fact that the plaintiffs surrendered a piece of land of twenty-four acres (Lot "Y" of Monsarrat's map) as being unsuitable for rice, and it was accepted by defendant. It must also be land upon which water could be brought from ditches or streams convenient and accessible. We do not think it necessary in this case to decide whether the words in the agreement binding the defendants to "furnish all the water necessary for the cultivation of said land with rice," compels them to cut and keep in repair the necessary canals to lead water to the land cultivated in rice by plaintiffs, for there is no allegation in the bill setting forth any default of this character by the defendant. It might be said, however, that in default of a particular covenant by the lessors to that effect, it is not to be implied that they were to expend money

and labor in the cutting of ditches to lead the water to the plaintiffs' rice fields, and that the action of the plaintiffs in making their own ditches is an indication of the way they interpreted the agreement.

The plaintiffs were bound to take whatever land of this character was delivered them by defendants up to 400 acres, additional to the 300 acres.

But rice land "furnished with water" means land for which enough water for the successful growing of crops of rice is reasonably accessible, and without charge to the plaintiffs for the use of such water.

Having settled these principles, there remains to be considered how much land of this character was delivered to the plaintiffs.

The plaintiffs claim that they are only liable for rent for 303.06 acres, as shown by the Rowell map, and the defendants claim rent for 363.58 acres, as shown by the Monsarrat map.

The difference between the parties is 60.52 acres, and it is made up of various parcels of land in Hanalei valley, in close proximity to the plaintiffs' rice fields.

The largest parcel in dispute is a lot of 24.69 acres, which is in the upper end of "Field A" in the Monsarrat map, marked "Lot F." The remaining difference is 41.91 acres, comprising lots "B, C, D, E" and "G" on the Monsarrat map.

A reference to the map makes it clear that these disputed parcels all bordered upon land taken and planted by plaintiffs as suitable for rice; they are, in fact, ends or remnants of such fields, and the territory is all within certain well defined natural boundaries, *i. e.*, the Hanalei river on two sides, the foothills on another side, and the "Poihanui" stream on the remaining side.

Mr. Koelling, the defendants' manager, says he delivered all of "Field A" (including "Lot F") to Chung Fook, representing plaintiffs, in March, 1880. He says he "went over the whole of the lot with him, and showed him the boundaries as laid down (in Monsarrat's map). He did not object to any part of it. It is very good soil, and all bottom land; was planted with cane. I laid out ditch in upper corner; spent two days leveling to show them where to bring on water. No part of 'Field A' is higher than the ditch." Chung Fook says: "We got lots 6 and 7 in

March, 1880." Lots 6 and 7, with the piece "F," comprise "Field A" of the Monsarrat map. "No land above 7 (lot 'F') is suitable for cultivation. Outside of where I cultivate in lot 7 is about ten feet above the river. Water cannot be taken on to the highest part above lot 7, and that is the only reason I do not plant it; it is good land."

Mr. Bertleman says that lot "F" is a little lower than 7, three or four feet above the river. "Certainly it is fit for rice culture. They want low land. There is good manienie grass there, and some bushes. The Chinamen have had their cattle there since they took possession." Mr. G. N. Wilcox says the piece marked "F" could be planted; not so flat as the rest of the valley. The part next the river might be subject to freshets.

Richard Gerke says of this tract of land that he examined it, and it was rich, alluvial soil, and not so much subject to floods as some other places then planted by plaintiffs. He applied to Chung Fook to lease this land to him, and received the reply that this was not allowable by the term of the lease, and that by and by they would plant it themselves. That the place was grown up with bushes and grass, and had cattle on it that looked well.

We think that the effect of this testimony is, that not only was this lot delivered to plaintiffs, but that its possession was retained by them. It cannot properly be urged that the plaintiffs are not liable to pay rent for this piece, because they use this lot for pasturage under the agreement that defendants are to "furnish pasturage upon the lands owned or controlled by the Plantation Company for the horses and cattle of Chulan & Co., used in working and cultivating the land." The plaintiffs' cattle were to be pastured on pasture land, free of charge, presumably in common with the defendants' cattle, and not upon land which is suitable for rice culture, and delivered as such. Lot "G," containing two or three acres, is declared by Messrs. Bertleman and Wilcox to be perfectly suitable for rice.

The lots "B" and "C" lie on three sides of lot 1, of Rowell's map, which plaintiffs plant with rice. Mr. Bertleman says of these lots that they are adapted for rice and have been planted in cane. Mr. Wilcox says of them: "I see no reason why they should not be planted in rice."

Lot "C" had been prepared for rice, but abandoned. Mr. Rowell, who surveyed these lands in 1880, says there were several patches around lot 1 prepared, but evidently abandoned.

As to lots "D" and "E," both Mr. Bertleman and Mr. Wilcox say they are now grown up with rushes, and are boggy and swampy; but it is said that their present condition is owing to neglect of draining during two or three years past. On the other hand, Mr. Rowell says that the land above 2 and 3 (lots "D" and "E") was swampy and rush-grown, and seemed to be blighted near the sour water, and that this swamp was not caused by not keeping drains open.

We are of opinion that these lots cannot be considered as suitable for rice culture, and so exempt the plaintiffs from liability to pay rent therefor.

Let a reference be made to the Clerk of the Court to ascertain the acreage of lots "D" and "E" of swampy, rush land, and on the coming in of this report a decree will be signed ordering the defendants to execute a lease in accordance with the agreement for 363.58 acres of land, less the acreage of lots "D" and "E," and that the parties settle their accounts on the above basis.

A. S. Hartwell, for plaintiffs.

F. M. Hatch, for defendants.

Honolulu, January 30, 1884.

SUPPLEMENTAL OPINION.

The decision having been filed on the 30th of January, counsel for the respective parties come before the Court, and counsel for plaintiffs claims that the plaintiffs should not pay interest on the amount found due by the Court.

The defendants claim interest on each item of rent, as it became due, on the acreage established by the Court, which is more than the acreage claimed to be chargeable by plaintiffs, and less than that claimed by defendants. As the acreage upon which the claim was based was uncertain, and was the subject of controversy in this action, the claim for its rent was an unliquidated claim. No demand is shown to have been made for the sum found due by the Court, nor was there any tender of this sum by the plaintiffs. The rule of law in such a case as this is, that interest is recoverable from the date of the writ, upon the

amount then due, and upon the sums thereafter becoming due, in accordance with the terms of the agreement, upon the acreage as found by the Court. We consider that the proceedings in this case are equivalent to an action by defendants to recover their rent. Interest is therefore allowed, as above, from December 4, 1882, the date of the writ.

The question is made as to the area of the land upon which the Court held that the plaintiffs were not chargeable for rent. From the proofs before us, we held that lots "D" and "E," as marked and testified to at the trial, were sufficiently definite. The only question left open was as to the area of the lots so marked, and to determine which the reference was made.

We think that costs should be divided.

Decree accordingly.

Honolulu, February 7, 1884.

AKENI vs. WONG KA MAU, *et al.*

EXCEPTIONS FROM RULING OF AUSTIN, J.

SPECIAL TERM, DECEMBER, 1888.

MCCULLY and AUSTIN, JJ. JUDD, C. J., being interested, did not sit.

The Boundary Commissioner for the Island of Oahu, upon settling the boundaries of the lands of Honouliuli, having, with the assent of all parties, received testimony as to the extent of the fishing rights claimed by the owner of the land, although he refused to award the right as claimed, as a right or as territory:

Held that the owner of an adjoining land, although represented at the hearing, was not estopped from disputing the boundaries of the fishing rights claimed to be shown by such evidence.

OPINION OF THE COURT, BY MCCULLY, J.

This case came to the Supreme Court by appeal from the Intermediary Court of Oahu. The original controversy is as to the

line dividing the fishing grounds respectively of the lands of Honouliuli and Waipio, in Pearl River, an extensive loch in the Island of Oahu. The exceptions relate to the ruling of the Court upon the effect of certain proceedings had before the Boundary Commissioner of Oahu. The following are the instructions asked for by the defendant and refused, and the instruction given by the Court:

1. That the plaintiff's lessors are estopped from now disputing the fishing right of Honouliuli, being present and assenting thereto, and the right of Waipio being then passed upon.

2. That if the jury are satisfied that J. Komoikeehuehu was present, he being the co-executor of the Chief Justice, and assenting, or either of them, that such assent to the finding is binding between the owners of Waipio and Honouliuli.

3. That if the jury find that either of them was present, it is strong evidence in favor of the defendants.

Which directions the presiding Judge declined to give, but directed the jury that the lessors of the plaintiff were not bound by the proceedings before the Boundary Commissioner, so far as regarded the fishing rights claimed. And that the case must be decided according to the law governing prescription in this country, as no grant is shown.

A copy of the record of the Boundary Commissioner is attached to the bill of exceptions, and we cite from it as follows:

"The present case is a claim of right of piscary over a navigable bay, or loch, perhaps unlike any other in the Kingdom, and is a claim of exclusive fishing right as to the whole of a certain branch of the part lying outside of a line 'chin deep' opposite the other lands situate on this branch. It is distinguishable from the right claimed, and by statute given to Konohiki with certain reservations—Civil Code, Secs. 387, 392—being a claim as a private and exclusive fishing right as completely as that within his 'chin deep' line is claimed for the lands adjacent."

"I find in repeated instances that the Board declined to award and define piscary rights, leaving parties to their rights under general statutes: e. g., in the award to Kiahua, Vol. 10, p. 50, where the fishing right was surveyed and included in the land asked for, the Board expressly refused to award this portion of

the survey, remitting the claimant to the law, indorsing this refusal both on the notes of survey in the award and on the accompanying plot, and no instances of a contrary practice are shown to me.

"Upon due consideration of the premises, I decline to award the fishery of Honouliuli as a right or as territory, but deeming it of importance that all rights depending on Kamaaina testimony be now settled, as far as may be, and knowing of no better place than the records of the Boundary Commissioner for the preservation of such claims, I take the testimony offered on the subject, and make such a supplementary finding as such testimony warrants.

"Fishing rights of Honouliuli, in Pearl Loch.

"For reasons set forth at large in the record of the Commissioner, the fishing right is not awarded in the body of the certificate of boundaries, but the finding of the Commissioner, on the testimony presented, as well as by the assent of parties adjacent and in interest, is set forth in this supplement, to wit:" * *

We think there is but one sentence in the above citation which colorably supports the proposition of the defendant, viz: the latter part of the last quoted sentence, these words, "the finding of the Commissioner on the testimony presented, as well as by the assent of parties adjacent and in interest, is set forth in this supplement as follows." But these words, even taken by themselves, fall short of a claim to jurisdiction. The finding is called a supplement, and is excluded from that which the Commissioner considered himself authorized to make. The assent of all parties must be taken to mean their assent to taking the testimony, *ex parte*, for preservation, which the owner of Honouliuli wished to present for preservation. But the determination of the Commissioner to take testimony must be considered, in view of what he had above expressed. Nothing can be more explicit and void of uncertainty than these words, "upon due consideration of the premises, I decline to award the fishery as a *right* or as a territory." He gives the authorities and reasoning by which he arrives at this conclusion. How can it be now claimed that a right or territorial line has been awarded by an officer when he has positively declined to make it? And how could the presence

of the representatives of Waipio be held to give assent to something which was not done at all ?

We therefore overrule the exceptions.

S. B. Dole, for plaintiff.

E. Preston and Cecil Brown, for defendants.

February 5, 1884.

In re BOUNDARIES OF KAPAHULU.

APPEAL FROM COMMISSIONER OF BOUNDARIES.

SPECIAL TERM, DECEMBER, 1883.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The evidence being very conflicting, and nearly evenly balanced, the Court affirms the decision of the Commissioner appealed from. -

Ex parte surveys, not followed by adverse possession, have little force as evidence of boundaries.

OPINION OF THE COURT, BY AUSTIN, J.

This case is here on appeal from a judgment rendered by the Boundary Commissioner of Oahu in the matter of the settlement of the boundaries of the Iliaina of Kapahulu. The owners of the adjoining lands of Waialae-nui and Waialae-iki claim that the judgment includes about 1,000 acres of land which properly belong to Waialae-nui.

The territory in dispute is a barren tract lying to the eastward of Diamond Head.

The boundaries of Kapahulu were declared by Boundary Commissioner W. P. Kamakau, by his judgment rendered December 23, 1872, to be nearly as now settled, but owing to certain legal defects in the fixing of the boundaries as to the land of Waialae-iki, the judgment was vacated by the decree of the Chancellor entered May 11, 1883, and a new proceeding was taken herein to again settle the boundaries of Kapahulu.

On carefully examining the evidence taken before the Boundary

Commissioner, and the additional evidence taken before us, we are inclined to believe that the decision of the Boundary Commissioner is right. The evidence is very conflicting, and is nearly evenly balanced. The contestants present maps made by Wm. Webster, of Waialae-iki and Waialae-nui, bearing date June 7, 1851, and copy of description of Waialae-iki, dated April 26, 1856, which, if correct, show that the contestants are entitled to the land in dispute.

We think, however, that there is not sufficient evidence that they were known of, or that the boundary as fixed by them was assented to at any time by the owners of Kapahulu. Certain acts of occupation with his cattle in grazing by Mahuka, the tenant of the contestants' ancestors, were shown, but nothing which would amount to an adverse possession, nor was such possession claimed. It was shown that Mahuka was the lessee of Kapahulu also, and this would account for his use of it, and some evidence says that the owners of Kapahulu were angry at the claim of Mahuka, based on the Webster map.

The evidence shows that Mahuka pointed out to Webster the boundaries of Kapahulu, and his map is based on this showing. Without possession or other supports, the map becomes only a mere declaration of Mahuka in favor of his lessors, and has little force. Against Mr. Webster's map, the petitioners present an old map of the adjoining land of "Kekio," made by W. H. Pease, in which the territory in dispute is called Kapahulu. This being an *ex parte* survey, the same criticism applies to it.

The comparatively valueless character of the land whose boundaries are here sought to be established, no doubt, largely accounts for the indefinite and contradictory nature of the testimony adduced.

The best result we are able to reach is that the boundaries of the land of Kapahulu are as described in the certificate of the Boundary Commission, and we therefore affirm the same.

S. B. Dole and W. O. Smith, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, January 14, 1884.

THE KING *vs.* MAHUKALILILI.

EXCEPTIONS FROM CIRCUIT COURT, THIRD JUDICIAL CIRCUIT.

JANUARY TERM, 1884.

JUDD, C. J., McCULLY and AUSTIN, JJ.

The defendant having been convicted upon indictment for forging and uttering a paper purporting to be a promissory note:

Held, that the line discriminating between such false instruments as do not bear the semblance of that of which they are counterfeits, and those which do bear it, must be determined by the complexion of each case as it arises.

The King *vs.* Helelilili, ante page 16, followed.

Held, also, that to show guilty knowledge and to rebut the presumption of innocence through ignorance, previous statements made by defendant, relating to other forged papers in his possession prior to the commission of the offense, are admissible in evidence.

OPINION OF THE COURT, BY McCULLY, J.

Bill of exceptions from the Third Judicial Circuit Court.

The defendant was convicted on an indictment charging forging and uttering an instrument of which the following is a copy:

\$70.00.

Honolulu, Sept. 14, 1883.

..... after date promise to pay to the order of
Mahukalilili Seventy Dollars,
at Mr. Hyman B. Value received.

No. 184. Due Geo. Willyon.

The words in italics form the printed blank which is filled. The testimony shows that the name intended to be the signature was Geo. Willfong. The note was offered by the defendant to the proprietors of a Chinese store, who cashed it.

The defendant's first exception is based on the provision in the chapter on forgery: Penal Code, Chap. XXX., Sec. 7: "Provided, however, that it is essential to constitute forgery that the false instrument should carry on its face the semblance of that for which it was counterfeited, and it should not be obviously invalid, void and of no effect."

In the *King vs. Heleliili*, heard on exceptions at the last July Term, the Court considered a case precisely parallel to this, and the reasoning and authorities there employed need not be repeated here.

The line discriminating between such false instruments as do not bear the semblance of that of which they are counterfeits and those which do bear it, must be determined by the complexion of each case as it arises, and it is not likely to exclude from the class of forgeries papers which are intended for forgeries, and which have been successfully uttered.

The next exception is to the admission of evidence of the defendant's having another draft for \$100 about a week before his arrest, and his statements concerning it. This was offered to show guilty knowledge and to rebut the presumption of innocence through ignorance. This is established doctrine in cases of forgery and counterfeiting. See *Greenleaf's Evidence*, Vol. 3, Secs. 111 and 111A, where many authorities are cited; also 115 Mass. 481, *Com. vs. Coe*.

The third exception, to the question what prisoner did with the said \$100 note, comes under the ruling on the foregoing exception.

And finally we do not find that the verdict was against the weight of evidence.

The exceptions are overruled.

Paul Neumann, Attorney-General.

W. C. Jones, for defendant.

Honolulu, January 28, 1884.

JOHN ROBELLO *vs.* WONG QUING.

APPEAL FROM POLICE COURT.

JANUARY TERM, 1884.

JUDD, C. J., McCULLY and AUSTIN, JJ.

The statute as to summary possession of land applies only where the relation of landlord and tenant exists.

Kaaihue vs. Crabbe, 8 Haw. 776, and *Coney vs. Manele*, 4 Haw. 154, approved.

Where a lease was made subject to a mortgage, and conditioned to be annulled on a foreclosure sale of the land: the vendee at foreclosure sale may bring the statutory proceeding for summary possession against the lessee.

It is too late to dismiss a case, on appeal, for defect in the summons, when no notice was taken of the defect in the lower court.

OPINION OF THE COURT, PER JUDD, C. J.

THIS is an appeal by the defendant to the Supreme Court in Banco, on a point of law, from a judgment in the Police Court of Honolulu.

The action purports to be brought in pursuance of the Statute entitled "Of summary proceedings to recover possession of land in certain cases." Civil Code, Art. 40, and amendment in 1864.

There is in evidence a mortgage upon certain premises on Liliha street, in Honolulu, dated 29th July, 1881, executed by Naukana (w.) and David Kanae, her husband, to one Maria Lowrey, securing the payment of \$500 and interest, in two years from date.

Also a lease of the same premises from the said mortgagors to Wong Quing (defendant), dated March 20, 1882, for ten years from date, at the annual rental of \$65, by which the lessee covenants to pay the rent at Mr. W. R. Castle's office until the mortgage is paid. The inference would be that Mr. Castle represented the mortgagee. There is also the following covenant: "This lease is made subject to the aforesaid mortgage, and if the land should be sold upon foreclosure of the mortgage, then this lease can be annulled."

There is in evidence, further, a deed dated 24th September, 1883, from F. C. Lowrey, describing himself as heir of Maria Lowrey, the mortgagee first mentioned, to John Robello (plaintiff), conveying to him upon foreclosure all the interest which he possessed by the mortgage.

The defendant urges that there is no relation of landlord and tenant existing between him and the plaintiff, and that therefore the statutory proceeding to dispossess a tenant does not apply. He claims that if the plaintiff, as the mortgagor's assignee, adopts the lease, then he is bound by it, and as the lease has not expired, the defendant is entitled to judgment. And if the plaintiff claims the lease to be void as being subsequent to the mortgage, then there is no relation or tenancy between the parties, and the defendant is a trespasser.

This Court held in *Kaaihue vs. Crabbe*, 3 Hawn. 776, that the statute we are now considering applies "only where the relation of landlord and tenant confessedly exists." This was affirmed in *Coney vs. Manele*, 4 Hawn., 154.

In Taylor's Landlord and Tenant, Sec. 720, the author says, in discussing a similar statute, in New York State: "This statute applies to cases where the conventional relation of landlord and tenant subsists, and not where it is created by operation of law. Therefore a mortgagor cannot be turned out of possession of the mortgaged premises under this statute."

In *Everston vs. Sutton*, 5 Wend., 281, Savage, C. J., says: "This statute is applicable between landlord and tenant only. No such relation existed between J. and T.; the whole proceedings, therefore, from beginning to end, have been without jurisdiction and void.

"The Statute was clearly designed to afford a speedy remedy where the conventional relation of landlord and tenant existed and not where that relation is created by operation of law. The Legislature never intended that the mortgagee should have a right to proceed under this Statute to obtain possession of the mortgaged premises after forfeiture."

This is undoubtedly good law. But the relation of landlord and tenant in the matter before us is not created by operation of law, as in the case of a mortgagor and mortgagee. It is created by the

lease itself, and the lessee is estopped to deny this. The tenant agreed in his lease that it should be forfeited if the premises were sold under foreclosure of the mortgage.

Our Statute, as amended, differs from that of New York, in that it confers jurisdiction upon the Court when the tenant is holding over "without right after the determination of such tenancy either by efflux of time or by *reason of any forfeiture under the conditions or covenants* in any such lease."

It seems to us that, if it be true, as conceded in argument, that the grantee of a lessor can bring summary proceedings under the Statute, to dispossess a tenant, who persists in remaining on the land after the determination of the tenancy for any statutory cause, there is no reason why the grantee of a mortgagee, succeeding to all the rights of the mortgagor, who was also grantor and lessor, cannot do the same.

The method of transferring the estate from the lessor to the defendant is only a little more circuitous than a direct sale from lessor to defendant. It was a condition in the lease that it should be annulled if the premises were sold under foreclosure. The defendant lessee entered the premises by virtue of this lease and covenanted to pay the rent to the mortgagee, and he cannot now say that it is void, and that he is a trespasser. The assignee of the title now claims that the lease is void by reason of the happening of an event which was contemplated both by the lessor and the defendant, and we think the plaintiff is, on these facts, entitled to judgment for the possession of the land.

The defendant's attorney called the Court's attention to the fact that the summons does not allege a tenancy between the parties. An omission of this character was held in *Coney vs. Manele* (supra) to be fatal. But in that case the motion to dismiss the summons on this ground was made in the District Court. In the case before us the motion was not only not made in the lower Court, so that the defendant could cure the defect by amendment, but the case was proceeded with as if the allegation of tenancy had been in the summons. The proofs all conformed to such a case. We think it is too late to dismiss the case on such grounds on appeal,

and allow the plaintiff to amend his summons in this respect, and he may then have judgment.

C. Brown, for plaintiff.

E. Preston, for defendant.

Honolulu, January, 1884.

HEEIA SUGAR PLANTATION CO. *vs.* JOHN McKEAGUE.

EXCEPTIONS.

JANUARY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

In absence of legislation forbidding it, a corporation can sustain a suit beyond the jurisdiction wherein it was constituted.

A Foreign Corporation, suing in this Kingdom, must set forth in its declaration that it has complied with the laws of the Kingdom as to foreign corporations.

Forms of complaints given in the Code are only guides to pleaders, and departures from them are not fatal to the complaint.

The authority of an agent or attorney making affidavit to a complaint, is not a proper subject of demurrer.

OPINION OF THE COURT, PER JUDD, C. J.

The case comes to this Court upon exceptions to the overruling of a demurrer to the complaint. The complaint avers, "that at the various times and dates hereinafter mentioned, the plaintiff was, and now is, a body corporate, duly incorporated under the laws of the State of California, United States of America, and as such corporation then was and now is acting and doing business on the Island of Oahu."

The demurrer reads, "That the said declaration, after alleging that the plaintiff is a foreign corporation, falls to show or allege that the said corporation has complied with the law of this Kingdom by filing in the office of the Minister of Interior the requisite

designation of a person upon whom service of process could be made."

There is abundant authority supporting the view that in the absence of legislation forbidding it, a foreign corporation can sustain a suit beyond the jurisdiction wherein it was constituted.

Silver Lake Bank vs. North, 4 Johns. Chanc. 370. Angell & Ames on Corporations Chap. XI.

But it is not necessary to enlarge upon this point, since we have a statute which prescribes that a foreign corporation shall be denied the benefit of the laws of this Kingdom unless it shall file in the Interior Office a designation of a person upon whom service of process can be made; and by Act of the Legislature of 1880 certain other requisites are to be complied with.

It is quite generally held that a corporation may declare in its corporate name without setting forth in the declaration the act of incorporation. Angell & Ames, Corp. Sec. 632, and cases there cited. But though it may not be necessary in the case before us to set forth the charter of the plaintiff, or the various steps it may have taken under the laws of the Kingdom, to enable it to do business in this country, we think it is necessary to set forth in the declaration that it is "legally" doing business in this country, or some other expression to indicate that it has complied with the laws of this Kingdom, in respect to foreign corporations.

We think this is necessary, in order that an issue can be made by which these facts can be inquired into. The averment that the foreign corporation "is now acting and doing business in the Island of Oahu," might be true of a foreign corporation that has not complied with the laws of Hawaii.

In those countries where the common law exists, the rules of special pleading would require that the question, as to the corporate character of the plaintiff, be made by a plea in abatement, since by pleading to the merits, the defendant admits the capacity of the plaintiff to sue. But the plea of the general issue by our statute allows the defendant "to give in evidence, as a defense to any civil action, any matter of law or fact whatever." Civil Code, Secs. 1106 and 1107.

And under this plea, the plaintiff, on its amended petition, would be required to show its corporate existence and its com-

pliance with the law. We allow the demurrer on this ground, and the plaintiff may amend accordingly and the defendant answer in twenty days.

The further objection is made that the conclusion of the complaint is insufficient, in that the plaintiff merely prays that process issue citing defendant to appear and answer the demand of the plaintiff, whereas he should pray for "process to cite the defendant to appear and answer this, his complaint, before a jury of the country at the..... term of this Court," etc.

The forms given in the Code for complaints in civil actions are only guides to pleaders. Declarations may be "in substance" according to the form given. The law does not require an exact compliance with the form, and a prayer for process citing defendant to appear and answer would entitle plaintiff to whatever process was suitable to his case under the law. We think it better practice to conclude with a prayer for process as indicated in the form, but do not think the departure in the plaintiff's declaration to be fatal.

As regards the authority of M. Neisser to make affidavit to the complaint as attorney, agent or director of the corporation, we think this is not a proper subject of demurrer.

P. Neumann and E. Preston, for plaintiff.

J. M. Davidson, for defendant.

Honolulu, February 4, 1884.

MAHUKALILII *et al.* vs. HIKAALANI HOBROH *et al.***EXCEPTIONS TO FINDINGS OF JUDD, C. J.****JANUARY TERM, 1884.****JUDD, C. J.; McCULLY and AUSTIN, JJ.**

An Appellate Court may in its discretion allow a reargument of a case, and correct manifest errors and mistakes in its decision rendered on the first argument.

The Court having held that the taking of a deed from the supposed heirs of the plaintiffs' ancestor by the defendant, who claimed by adverse possession, was fatal to his adverse claim: Held, on reargument, that the deed might be so construed as not to defeat the grantee's adverse claim.

Slight proof of adverse possession held sufficient, considering the nature of the land in question.

OPINION OF THE COURT ON THE FIRST ARGUMENT, BY McCULLY, J.

This was a case in ejectment, the jury being waived, heard by the Chief Justice, holding the term. The finding was for the defendants. Exceptions were taken generally, and the case comes before us, with an abstract of the testimony, on its merits. The claim of the plaintiff is by descent from the patentee, one Alapai, and it is not denied that the legal title by descent now rests in him. The defense is adverse possession.

The defense introduce a conveyance of this land to Kalaeone, defendants' privy, dated July 6, 1866, which appears to us to afford a solution of all the questions in the case. It appears in evidence, as stated by the Chief Justice, who heard the case, "that Alapai (the grantee named in the Royal Patent) died in Koolau, not having lived on the land, and the Royal Patent for it was taken out on the previous award of the Board of Land Claims, in 1856, by Kalaeone. Kuheleloa and Kameenui, who were sisters and persons of some distinction, assumed charge of this land, and became in succession the wives of this Kalaeone, a man of some note. Kuheleloa was Alapai's grand-aunt, a rela-

tionship not capable, under recent adjudications, of inheriting the property of Alapai, but sufficient to account for Kameenui and Kuheleloa's assuming the ownership of the land.

The grantors in the deed of 1866 were the widow of Alapai and her husband, and Kalapao, the husband of Nihoa, only child and heir of Alapai, who had died in 1860, Alapai having died in 1853. In the deed they are described as the "pili kino," that is, the relatives and heirs at law of Alapai. But it now appears that they were not such, for the real estate of Nihoa, dying intestate and without issue, descended to her aunt Kaohe, through whom the plaintiff would take.

The testimony as to the possession by Kuheleloa very slightly supports an adverse possession, as taken under a claim hostile to the real owner. The nature of the piece of land here in controversy, as the Chief Justice remarks in his decision, renders it difficult to get satisfactory testimony as to the occupation of it. "It is a barren piece of sandy land on the beach at Waikiki, not capable of producing any crop, and having nothing on it but a few cocoanut trees and *hau* bushes." It was never fenced. It was not the residence of Alapai, and it is not claimed that Kaohe, who became heir to it without probably apprehending her right, ever took or claimed a right of possession. Kalaeone had a house near this piece of land, and the testimony leaves us in doubt whether such slight acts of possession as are shown may not have been merely the occupation of neighboring unoccupied territory.

But, however it might be found upon the question of an adverse possession prior to 1866, if there had been no deed produced from the supposed heirs of Alapai, we are of opinion that the acceptance of this deed is proof that at that date the grantees made no claim of right of possession, and consequently were not holding adversely. The fact that the grantors of the deed were without title does not affect the admission that the grantees claimed none. Such admission cuts off from the necessary period of prescription all the time prior.

In *Gray vs. Moffitt*, 5 Am. Decisions, 634, held that the operation of the statute ceases against a claim purchased or brought in aid of the protection of the possession, for a claim thus recognized

and brought in to protect the possession cannot be adverse and hostile to it. This reasoning, *a priori*, applies with greater force where the proof of former holding by a claim of right is as feeble as in this case. This is not the case of one in possession and asserting a claim, purchasing a quit claim of title for the sake of peace.

See *Burhans vs. Van Zandt*, 7 Barb., 106 ; *Northrop vs. Wright*, 7 Hill, 490.

The deed in this case clearly recognizes the title as being in the heirs at law of Alapai. If the grantors had been the heirs, or if the real heir, Kahohe, had been one of the grantors, the defendants would not stand on an adverse possession from 1866, or from the death of Alapai. But if they have held under a deed which is invalid for a time, sixteen years less than the statute, they cannot now set up that their holding prior to 1866 was hostile and adverse to the heirs. The acceptance of the deed was a surrender by operation of law of any title which they might have been maintaining in the premises.

Lyon vs. Reed, 13 M. & W., 284 ; *McCracken vs. San Francisco*, 16 Cal., 686.

The defendants' privies having "asserted, either by declarations or conduct, the title to the property to be in others, the statute cannot run in their favor."

For these reasons the judgment must be reversed, and judgment entered for the plaintiff.

Honolulu, February 21, 1884.

OPINION ON REARGUMENT, BY AUSTIN, J.

The plaintiff's counsel now claims that this Court has no power to entertain a reargument of the case, because it has already made a decision of it, which is final and conclusive, under Article 69 of the Constitution, which declares that "The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties."

The Constitution of New York provides for seven Judges of the Court of Appeals, its highest Court, and provides that "any five members of the Court shall form a quorum, and the concurrence of four shall be necessary to a decision."

These provisions are similar. It is not requisite to say, in order to render final the decision of a majority of the highest Court of a country, that it is final. That follows as a matter of course, unless otherwise expressly stated. It must necessarily be binding upon all men. But to say that manifest errors and mistakes, in what has the form of a final judgment, cannot be corrected by the highest Court in its discretion, when seasonably brought to its notice, is unreasonable, and might work great injustice. And whether the application is seasonable or not, must also rest in the discretion of the highest tribunal.

It has been uniformly, and we think wisely, so held in the State of New York, and we shall so hold.

Upon re-examining the question on its merits, we are constrained to believe that too much stress was laid upon the supposed admission, by the deed taken in 1866, of the title of the plaintiff.

There was evidence, which the Court below held sufficient, of adverse possession for nearly ten years up to the taking of that deed. The plaintiff claims as the heir of Nihoa, who was daughter of Alapai, the original patentee. But she died in 1860, and when the deed of 1866 was taken, her heir, the plaintiff, had been the real owner for six years.

The deed of 1866 ignores and denies Nihoa's right, and the grantors in the deed claim to be the heirs of Alapai. Instead of admitting, the deed directly denies the plaintiff's title obtained through Nihoa.

Acts denying the title of Nihoa by the grantee, in the deed of 1866, had been done, insufficient, it may be, to show disseisin, but constituting a claim of title as against her. The deed was taken to be an acknowledgment of the title of Nihoa, but it in fact might be taken as a denial of it.

We are also, on further thought and research, inclined to believe that even had the deed's recital been as the Court supposed, the effect thereof was taken too strongly against the defendant. See *Cannon vs. Stockman*, 36 Cal. 535; *Jackson vs. Sears*, 10 Johns. 436.

We have examined with care the argument of the plaintiff's counsel, as to proof of the nature of the possession required to be

deemed adverse. In many of the United States there are special statutes defining what shall constitute adverse possession in different cases. In New York there is such a statute. There is none such in this country. Under the statute of New York, we think the adverse possession would hardly be made out in this case. Many of the decisions quoted cannot be understandingly read, or be surely relied on as applicable here, without reading the special statutory law which applies to them. As has been said, the nature of the land in question is such as to require the most meagre proof of acts of possession to ripen into title. We are convinced that, as found by the Chief Justice, there was sufficient proof of title in the defendant by adverse possession.

Because of the mistake to which we have referred, we have concluded to reverse our decision, and to affirm the judgment of the Court below.

A. FRANCIS JUDD,
BENJ. H. AUSTIN.

The former opinion of the Court was based on the fact that the deed taken in 1866 was an acknowledgment of title in other parties. But as it was not an acknowledgment of the title of plaintiff's ancestor, and may be considered an exclusion of such title, and especially as from the nominal consideration expressed, two dollars, it may well be considered a quit claim, and to make more certain the right under which Kuheleloa had been holding by the *Kauoha*, or verbal bequest of Alapai, I sign the foregoing opinion.

LAWRENCE McCULLY.

W. R. Castle and *C. W. Ashford*, for plaintiff.

C. Brown and *R. F. Bickerton*, for defendant.

Honolulu, April 12, 1884.

W. M. GIBSON, President Board of Health, vs. THE
STEAMER MADRAS.

APPEAL FROM DECISION OF JUDD, C. J., IN ADMIRALTY.

JANUARY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The meaning of the word "Quarantine" considered.

A steamer with smallpox on board held, under the circumstances, not to have been in quarantine during the time she lay outside the harbor, pending a controversy with the Board of Health, and under a prohibition by it to enter the harbor; and therefore not liable for expenses of the Board of Health in guarding her.

The decision of the Chief Justice, appealed from, was as follows:

OPINION OF THE CHIEF JUSTICE.

This is a libel in admiralty by the President of the Board of Health of the Hawaiian Kingdom against the steamer Madras, whereof W. H. Bradley is master, filed on the 12th of June. Attachment was made on the same day. On the filing of a bond, deemed sufficient by the libellant, the vessel was released from attachment.

The libel recites, in substance, that the steamship Madras arrived at the port of Honolulu on the 8th of April, 1883, upon a voyage from Hongkong, in China, with 745 Chinese passengers, of whom 600, more or less, were bound for the port of Honolulu; that the master signed a health certificate that there was no sickness on board; that libellant thereafter discovered that the said steamer was infected with a disease known as the "smallpox," and that two of the passengers were at that time sick with the said disease, of which fact the master was aware; that libellant caused the steamer to be kept out of the harbor of Honolulu, and the master and crew were wholly unable and insufficient to control their passengers; that several of the passengers escaped and attempted to land with a boat, and subsequently eight attempted

to swim ashore; that, in consequence of the neglect or inability of the master to control said passengers, the libellant caused a guard of eight to sixteen men to patrol about the steamer, and prevent unauthorized communication with the shore and the landing of her passengers or crew; that said guard was proper and necessary, and that, without the same, the smallpox would have been introduced among the inhabitants of this kingdom from the steamer, and great loss of life and damage would have ensued therefrom; that, by reason of the premises aforesaid, the Board of Health has been damnified in the sum of \$1,742.25, according to the specification annexed, which shows these sums to have been expended in the hiring of guards and boats, etc.

The answer of Captain W. H. Bradley, intervening, admits that the Madras arrived off the port of Honolulu on the 10th, and not on the 8th of April, upon a voyage from Hongkong, China, with the number of passengers mentioned in the libel; that he did sign and deliver to the pilot a qualified health certificate, which is now in custody of libellant, and which he craves leave to refer to; that libellant did discover that the Madras was infected with a contagious disease, known as smallpox; but that libellant discovered these facts in consequence of respondent having communicated them to the Port Physician of Honolulu. The respondent denies that the libellant caused the steamer to be kept out of the harbor of Honolulu, and afterwards respondent anchored her off the port, but avers that respondent brought his vessel to anchor off the port before any communication was had with libellant, or any officer of the Board of Health; that respondent's crew consisted of forty-two persons, and were able and sufficient to control said passengers. Respondent admits that some of the passengers endeavored to escape from the vessel, but that they were pursued and brought on board by some of the crew thereof. He admits that, subsequently, eight passengers did attempt to swim on shore. Respondent denies all the other allegations, and says that if the alleged expenses have been incurred, they have been incurred without any authority or justification in law against the respondent or the said vessel.

A short history of this case, as derived from the letters between the parties and oral testimony, is as follows: On the 10th

of April the *Madras* arrived off the port with smallpox among her Chinese passengers. She was boarded by the pilot, and Captain Bradley signed a health certificate wherein, after the printed words "no person has died or been sick of a contagious disease on board my vessel during the last six months," was written, "I have handed pilot a letter of explanation to the health officer of the port." The captain gave the pilot a letter to the port physician and one to the Minister of Foreign Affairs, the vessel having been anchored outside the harbor at the captain's request. The pilot delivered the letter to the port physician in the channel, as he was proceeding outside to the steamer. In both of these letters Captain Bradley says he has smallpox on board, and asks to be allowed to remove the Honolulu passengers to the quarantine station, and put his vessel into quarantine, and to have 200 tons of coal put on the dock before the *Madras* should come alongside, and then to have it taken on board by her crew, and the freight discharged in the same manner.

The same day, April 10th, the Secretary of the Board of Health sent to Captain Bradley a note acknowledging receipt of his note, stating that the Board of Health had met that day and had passed a resolution, of which a copy was inclosed, and also that the Government was ready to afford him every facility for assisting his vessel with coal, water and provisions, and other needed recruits, but that, in view of his having a contagious disease on board, they cannot permit him to land any passengers. The resolution of the Board of Health in substance "empowered its President to take such steps as he may deem proper, and every necessary precaution to avoid the risk of contagion, and in consequence to prevent the landing of any passengers from the steamer *Madras*."

On the 11th of April Captain Bradley sends a letter to the Board of Health, expressing his surprise that the Board of Health should have stated to the British Commissioner that they felt dissatisfied with his having furnished a false certificate of health, denying that he had done so, and that he had his ship anchored outside, and had sent for the port physician and furnished him with a faithful account of the condition of his ship. He apologizes for some language used in a letter written by him on the evening of the 10th, as being under excitement, and asks the

Board of Health to reconsider their resolution and allow him to land the Honolulu passengers, and offering to give a bond to pay their expenses while in quarantine. The President of the Board of Health replies on the 12th April, to the effect that the Board of Health see no reason to modify their resolution of the 10th instant, and decline to allow him to land any passengers, who are unquestionably liable to introduce a contagious disease into the country, offering to supply him with recruits, etc. The same day the President of the Board of Health informed Mr. Davies, the British Vice-Consul and agent of the vessel, that the Madras would not be allowed to land her passengers at all.

On April 14th, T. H. Davies & Co., agents of the Madras, applied to bring the ship under some quarantine regulations, such as the law might provide, etc.

To this the President of the Board of Health replied, under date of April 19th, that "the steamer Madras may be regarded as in quarantine, inasmuch as her commander has hoisted the yellow flag, by order of the Port Physician, and the vessel remains at anchor in the roadstead of Honolulu, which is made quarantine ground by statute, and has been supplied with necessary recruits, under quarantine surveillance," etc.

Mr. Davies replies, on same date, noting the declaration that the Madras may be considered in quarantine, and asking "that the Captain be informed what quarantine or other restrictions have to be observed by him from the breaking out of the latest case on board, in order to enable him to land his passengers at this port."

April 24th, the Secretary of the Board of Health replied that "the vessel was in quarantine for recruits, but not for passengers."

On the 5th of May an inspection of the Madras was made by three physicians of Honolulu. They reported no case of small-pox since April 21st, and recommended that the vessel be allowed to come inside the harbor, the ship, Captain and crew to remain in strict quarantine. The Honolulu passengers to be landed on the reef in quarantine, but the convalescents not to be landed. The ship to land cargo and receive coal and recruits in quarantine.

On the 7th of May the Board of Health wrote to the agents of the Madras that the steamship Madras would be allowed to enter port and land her Chinese passengers in quarantine, under the following conditions: The vessel to pay all charges incurred for quarantine surveillance since she came to anchor in the roadstead and during her stay in port: The Chinese passengers will be landed on the reef of Kahakaulana, and there placed in quarantine for at least ten days, and the vessel to pay all expenses of debarkation, food, guard and medical attendance for said passengers during the term of quarantine, and other definite regulations as to freight, baggage, coal and recruits, and that the agents of the steamer enter into a bond, to the amount of \$20 for each passenger, to indemnify the Government for expenses in case any disease should break out during the quarantine.

May 8th—The Madras, on the Captain receiving this letter, steamed into port, but went back again to her anchorage on being informed by her agents that the Board of Health understood that the conditions imposed must be complied with before she entered the harbor. As the Madras was starting out of the harbor, eight Chinese passengers jumped overboard; these men were picked up by the police boats and returned on board the vessel.

May 8th—Written notice was sent by the President of the Board of Health to Captain Bradley that the "steamer Madras, also yourself, officers, crew, passengers and freight of said vessel, being in quarantine and under the orders of the Board of Health," his attention is called to Sections 292, 293 and 295 of the Civil Code, which are recited in full.

May 9th—Mr. Davies reported verbally to the agent of the Board of Health that Captain Bradley informed him that a number of cases of smallpox were discovered on the Madras, concealed among other passengers. This report was made in writing to the President of the Board of Health by Mr. Davies on the 10th May. The same day the President of the Board of Health acknowledges receipt of this information, and informs Mr. Davies that the Board of Health will have to reconsider the action to be taken in reference to the vessel.

May 12th—Captain Bradley writes to the agent of the Board of

Health that during the night previous one of the steamer's boats was lowered by Chinamen, and got away from the ship, but as the Captain burnt lights to attract the attention of the guard-boats, the boat returned. The Captain then proposed a set of signals to be used in event of anything happening in the night, and asking the agent to watch for the signals.

Soon after this Mr. Davies was invited to a session of the Board of Health, where the affairs of the Madras were discussed. On the 12th May, Mr. Davies writes to the President of the Board of Health, saying that his firm was authorized, on behalf of Captain Bradley, to assent to all the conditions of the Board's letter to him of that date, and they (Davies & Co.) agreed to become sureties on the bond therein demanded, and to execute the same as soon as the document can be prepared.

Mr. Davies says, in his testimony, that he had recommended Captain Bradley to accede to all the conditions in regard to landing the passengers, and that the Captain did so. All expenses incurred in this matter, up to this date, were to be paid by the Madras, and a bond was to be given in the sum of \$20,000 to cover expenses thereafter incurred, etc.

The bond was first to be signed, and a draft was submitted to Mr. Davies on the 14th May. It was deemed unsatisfactory by him and Captain Bradley, and, under advice of counsel, they declined to sign it, as containing provisions not agreed upon, to wit: that the obligors were to pay for (among other things) "the repairing or extending the buildings which may be used for accommodation of the said passengers." Negotiations then ceased.

On May 21st, Mr. Davies applied to the Board of Health to know if the Madras was in quarantine, and, if so, under what regulations?

The President of the Board of Health declined to discuss the matter with Mr. Davies, considering that his firm were not the authorized agents of the Madras.

Then followed a reference of this matter by the agents of the Madras to the representative of the British Government, and through his intervention there was procured that the Madras should be entered at the Custom House, and that Messrs. Davies & Co. should be recognized as agents of the Madras, and that the

Madras was to be placed under the quarantine regulations of December, 1880.

On the 2d June it was agreed between Mr. Davies and the President of the Board of Health that a bond for \$10,000 should be given to cover all future expenses, and that the previous expenditures of the Board of Health in this matter should be submitted to the Supreme Court, and on the 5th June the agents of the Madras agreed, in writing, in effect, that the question of the steamer's liability for the quarantine expenses in dispute should not be prejudiced by the landing of the passengers from the Madras. The bond was given, and the Madras was entered at the Custom House, and the Honolulu passengers landed in quarantine June 7th, and after some further misunderstandings, followed by explanations, as to making up the claim, preparing a case for submission to the Court, and in reference to the clearance of the vessel, which are not necessary to be here detailed, the matter was finally terminated by the filing of this libel.

There were many other matters put in evidence, as the impudent and hasty remarks made by the Captain of the Madras, as to what he would and would not do under certain circumstances, and the replies made to him, which are irrelevant to the issue before me, which is: whether the steamship Madras is liable for the expenditure of the Board of Health, as claimed?

The amounts of the charges made for the hiring of guards and boats are shown to be reasonable, being the actual sums paid out by the Board of Health in this behalf. The question remains whether there were expenses incurred under "quarantine regulations." Section 298 of the Civil Code reads: "All expenses incurred on account of any person, vessel or goods under any quarantine regulations, shall be paid by such person, vessel or owner of such vessel or goods, respectively."

There can be no question as to the vital necessity of maintaining a strict surveillance over vessels arriving here with dangerous and contagious diseases on board. It is the duty of the State to protect the public health. For this reason ample power is given by law to the Board of Health, and the general authority is given them to make such "quarantine regulations as it shall judge necessary for the health and safety of the inhabitants." (Section

292 Civil Code.) "Any vessel refusing to submit to quarantine, and leaving the quarantine ground before the expiration of the quarantine, or which shall be the means of clandestinely introducing into the Kingdom any contagious or dangerous disease, shall be liable to seizure, confiscation and sale." Section 295 Civil Code.

But the Board of Health has a duty to perform, as far as foreign vessels are concerned. One of these is given by Section 272: "The Board of Health may, from time to time, establish the quarantine to be performed by vessels arriving at any port of the Kingdom." Now, a quarantine is defined to be (1), properly the space of forty days; appropriately, the term of forty days during which a ship arriving in port, and suspected of being infected with a malignant or contagious disease, is obliged to forbear all intercourse with the city or place. This time was chosen, because it was supposed that any infectious disease would break out, if at all, within that period. (2.) Hence, the word means restraint of intercourse to which a ship may be subjected, on the presumption that she may be infected, either for forty days or for any other limited period. (Webster's Dictionary, title Quarantine.)

It is a general rule in every country that the proper officers may determine the period of restraint at their discretion, according to circumstances, and I think that Section 292 of the Civil Code, in authorizing the Board of Health to establish the quarantine to be performed by all vessels, etc., was meant to confer this very power, to wit: that the period of restraint and non-intercourse to which vessels arriving here are to be subjected, must be definitely settled and established by the Board of Health. The very idea of a quarantine implies that it is for a definite, limited time. And it would be quite competent for the Board of Health, on the expiration of one quarantine, if there should be a fresh outbreak of disease on a ship, to establish a further quarantine.

I do not go to the extent of saying that the definite term of quarantine for all ships cannot be varied to suit the exigencies of any particular case or disease. I think, as the power is given to establish, "from time to time," the quarantine to be performed by vessels, that a ship, under exceptional circumstances, may be

subjected to exceptional quarantine, without the formality of repealing the formerly established period, and establishing a new term.

But I understand that the Board of Health had, by a regulation, last published in December, 1880, established a quarantine of fifteen days for crews and passengers of vessels having small-pox on board. (See Regulations Board of Health.)

Was the Madras regularly in quarantine while the Board of Health incurred the expenditures, the subject of this controversy? And were these expenditures incurred under any quarantine regulations? Unless they were, plaintiff cannot recover. It would not be just to exact the severe penalty of confiscation and sale of a vessel for expenses of quarantine, unless notice of the liability is given to the vessel, and she is made aware of the restraint imposed, and its duration and consequences. For instance, if a vessel should arrive here from a port infested with cholera, and a quarantine of twelve months should be established for her, it is quite possible that the vessel might not be willing to submit to it, and, if the nature of her voyage admitted of it, she might return to the port whence she came without undergoing quarantine.

I do not understand that the Madras was put in quarantine by the written declaration made by the President of the Board of Health of April 19th, that the Madras may be regarded as in quarantine, "qualified by the statement of the Secretary to the agents to the vessel that she was in quarantine for recruits but not for passengers," for no period of restraint was stated. It is difficult to understand what was meant by "quarantine for recruits but not for passengers." If the words mean anything, they mean that no period of restraint, however long, would suffice after which the passengers could be landed from the Madras. A statement being made to a ship, "you are in quarantine," this condition of things might last for months or years, and the expense of watching the vessel consume her entire value. I avoid saying anything here as to the power of the Government to altogether refuse permission to citizens of a State, with whom we have no treaty securing this right, to land in this Kingdom. For although the first resolution of the Board of

Health was to the effect that its President was empowered to prevent the landing of any passengers from the steamer Madras, this position was not adhered to by the Government, and the passengers were finally allowed to be landed. If the Madras had been placed in a definite quarantine, and quarantine regulations required her to be watched with guards in patrol boats, or otherwise, during this period, these and whatever expenses were necessarily incurred in maintaining this quarantine would have to be paid by the vessel.

She was, however, kept in a state of uncertainty for a period of nearly two months, and all the while the expenses were being incurred. The action taken by the Board of Health in allowing her well passengers to be landed and put in a quarantine of 21 days, could have been taken immediately on the arrival of the vessel here, and this large expenditure saved.

It was certainly necessary to watch the vessel to prevent passengers, weary of the restraints of a long voyage and excited by their fears of the disease among them, from escaping ashore, and thus spreading the infection among our people, but if the passengers were ever to be allowed to be landed on these shores, they should have been landed in quarantine, reasonably soon after their arrival here, and some guards would have been necessary, but for only a few days, exclusive of the period of shore quarantine, which is not in question in this suit.

The danger to the health of the community from smallpox was not at all lessened by detaining the ship outside, with so large a number of passengers confined on board for so long a time; in fact, the contagion increased on board during that time.

Quarantine Rule 2, published on December 11, 1880, reads: "On the arrival of any vessel at any port of this kingdom having had or still having any person sick of smallpox on board, the vessel shall be detained in quarantine; the sick shall be sent to the quarantine hospital, and the crew and passengers shall be submitted to quarantine for fifteen days."

Now, if this regulation had been put in force against the Madras on her arrival at this port, the probability is strong that she would have been released from quarantine and sailed hence within a month.

It would not be just to compel the Madras to pay for guards in watching her for any longer than was necessary, say, for a period of a few days, sufficient to enable the authorities to prepare the quarters for the reception of the passengers. There is no testimony before me indicating precisely how many days would be sufficient. But it seems to me that one week would be ample time, and for guards for this period only is the Madras liable.

I can draw no other conclusion from the whole testimony in this case than this: That the Board of Health, from the time of the arrival of the Madras, April 10th, to May 7th, had not only not put the Madras in definite quarantine, but did not intend to put her into a quarantine contemplating the landing of her passengers after the danger from infection was over, for, up to this latter date, there is no intimation given to the Madras as to when the period of her non-intercourse with the shore would cease, or be likely to cease.

It is perfectly clear that, if the Board of Health had adhered to its decision, and the passengers per Madras had never been allowed to land, and she had gone off to some other port, the Board of Health could not have recovered from her their expenses incurred in restraining her from having intercourse with the shore, and the expenses now sued for are quite analogous, for they were incurred before the Madras was put in quarantine, which was not until about June 1st.

Judgment will be entered for the libellant for the amount of expenses of guards and boats for one week, and this matter is referred to the Clerk of the Court to assess and report to the Court. Each party to pay his own costs.

OPINION OF THE FULL COURT, BY McCULLY, J.

We shall not in this opinion repeat the statement of the case or of the various transactions and extensive correspondence, which have been set forth very fully in the published opinion of the Chief Justice, referring to that for such matters as are necessary for the better understanding of the whole case.

The libel is to recover \$1,742 25, for expenses of guarding the steamer Madras, to prevent the clandestine landing of Chinese passengers from the ship while lying at anchor outside the har-

bor, and having smallpox cases on board; and the issue between the parties is, whether the steamer was at that time "in quarantine," and therefore chargeable with expenses incurred in maintaining such quarantine.

Sec. 298, Civil Code, reads: "All expenses incurred on account of any person, vessel or goods under any quarantine regulations shall be paid by such person or vessel, or owner of such vessel or goods respectively."

The Madras anchored off the port April 10th. On the 7th of May the Board of Health wrote to her agents that she would be allowed to enter port and land the Honolulu Chinese passengers in quarantine, under certain conditions. After further negotiations and delay she entered and was quarantined. Previously to this date there had been an absolute prohibition to enter the port and to land passengers. Only permission had been given to receive recruits under restrictions of non-intercourse, leaving her then to proceed to some other part of the world. It is not in controversy that the steamer was placed at the last in due quarantine, and in a different status to that in which she was held at first, and during the time the expenses here claimed were incurred. The essential and characteristic difference between these two states is, that the first was a prohibition to land passengers and freight upon any terms and at all; the second was what is commonly known as a quarantine, to be performed under quarantine regulations, whereby the passengers were landed at a lawful quarantine station; the sick separated from the well, and the well detained under medical inspection for a prescribed time, when, if it appeared that they were free from contagion, they should be discharged; and the freight to be landed at a quarantine station, there to undergo disinfection.

The word "Quarantine" is defined in Tomlin's Law Dictionary: "The term of forty days during which persons coming from foreign ports infected with the plague are not permitted to come ashore." Burrill's Law Dictionary takes the definition from Brande: "A period of time originally consisting of forty days, but now of variable length," etc.

Our own statutes, while not defining the word, imply from the phrases "quarantine to be performed," "expiration of the quar-

antine," etc., a term to be entered upon and finished with the result of access to the country. Regulations which the Board of Health have made express this clearly, *e. g.*, Quarantine Rule 2, published December 11, 1880, reads: "On the arrival of any vessel at any port of this Kingdom having had or still having any person sick of the smallpox on board, the vessel shall be sent to the quarantine grounds, the sick to be sent to the quarantine hospital, and the crew and passengers shall be submitted to quarantine for fifteen days."

It is not doubted that the period of quarantine detention and observation may be for so long as is necessary to insure that the ship, crew, passengers and freight bring no contagion or infection into the Kingdom, and that when a time is set it may be extended when it appears that it is necessary for the purpose. But in all quarantine statutes known to us we find that there are provisions for release as well as detention.

The captain of the Madras had reported on arrival that he had 586 passengers for Honolulu and some cargo. Under date of April 10, 1883, the day of his arrival, the Secretary of the Board of Health sent the following letter to the captain:

"I herewith enclose you a resolution of the Board of Health, unanimously passed at a meeting of the Board held at 2 p. m. this day. I am requested by his Excellency the President of the Board of Health to acknowledge receipt of your letter dated 'On Board Madras' this day, and to say that the Government are ready to afford you every facility for assisting your vessel with coal, water and provisions, and other needed recruits, but, in view of your having contagious disease on board, cannot permit you to land any passengers."

At a later date the Secretary of the Board informed the captain that "he was in quarantine for recruits, but not for passengers." These words can mean only what is expressed in the letter, that the ship may take recruits and sail on. Calling this a quarantine of any kind does not make it one.

We have considered the arguments of counsel for the libellant, that the term quarantine must receive a large and liberal construction, not always limiting it to what the regulations may pre-

scribe for ordinary cases, and likewise that the Board of Health has power to deal with special cases by special regulations, giving parties concerned personal notice of them. This may be conceded for argument in this case, but if our definition of a quarantine is correct, that it is a term of surveillance under prescribed regulations, to be performed and finished with a result, then no liberality of construction will reach to what is claimed by the libellant. For, as appears by the letter above quoted, the steamer was prohibited from landing passengers purely and simply. Prohibition is not quarantine. The steamer was "performing" nothing during the time that she was guarded by boats. At the end of the month she had not commenced a quarantine, and continuing in the state she then was, she would never have accomplished her quarantine. If she had at once accepted the order of the Board of Health as a finality, she would have taken her coal and other recruits under such restrictions as would have been imposed, and thereupon steamed out to sea. The libellant's demand is for a reimbursement of quarantine expenses, and recovery depends upon their having been such. They are the cost of guarding the ship by boats while she lay at anchor outside the harbor, under the prohibition of the Board of Health to enter. The prohibition might have been enforced in a supposable case by the guns of a fortress. But, however the prohibition was secured, and for however long a time, this alone cannot be considered to constitute quarantine. This is not to say that quarantine might not be performed on board a ship, as at some ports in the world it is. But in the case of the Madras no quarantine regulations were prescribed to be performed while she lay outside, her captain and agents meantime asking that she be admitted to perform quarantine, and the Board of Health denying the request.

As no question was raised before us as to the amount allowed by the Chief Justice for the week of guard while the Quarantine Station was got in readiness, we hereby affirm the previous judgment entire.

Attorney General Neumann and F. M. Hatch, for libellant.

E. Preston, for claimants.

Honolulu, February 26, 1884.

GEORGE S. KENWAY, by his Guardian, Mary Ann Kenway,
vs. CHARLES NOTLEY.

EXCEPTIONS FROM RULINGS OF McCULLY, J.

JANUARY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A lease of lands conveyed to husband and wife, and purporting to be made by them, but executed by the husband only, on which the wife received rent after the husband's death: Held to have been ratified by the wife.

Re-argument refused.

OPINION OF THE COURT, BY AUSTIN, J.

THIS case is here on exceptions to the direction of Mr. Justice McCully to the jury, at the January Term, to find a verdict for the defendant.

The action was ejectment. By Royal Patent No. 2321, dated September 15, 1856, the land in dispute was granted to George S. Kenway and Mary Ann Kenway, his wife. He died in 1872, and she, by deed dated September 13, 1877, conveyed said land to her infant son, the plaintiff, who now holds the fee. It further appeared that, on the second day of September, 1867, a lease was executed of said land, expressed in the body of it to be from the said George S. and Mary Ann Kenway of the first part, for themselves and on behalf of their three daughters named therein, to S. Kipi of the second part, for the term of twenty years, at the annual rent of fifty dollars. And the said Kipi covenants to pay to the said Kenways the said rent, and further covenants with them "that he will put into good habitable condition, and so maintain at his own expense during the term of the lease, all the buildings now on or that may hereafter, during the term of this lease, be built on the said land and premises, and that he shall and will allow the said George S. Kenway and Mary Ann Kenway and their family or any part thereof free access to and freely to dwell on the said leased premises, and freely to cultivate and

use so much of the said land as they may require for their own purposes, and to have the freedom of pasture on the said land for their own animals during the full term of the said lease." This lease was executed and acknowledged by George S. Kenway alone with S. Kipi, the lessee.

It further appeared that on the sixth day of August, 1875, the said Kipi assigned said lease to the defendant Charles Notley, who now claims, subject to the performance by him of all its conditions, the possession under it.

It further appeared that Mrs. Kenway signed eight receipts for rent to Notley, which are on file. The first receipt in evidence was dated December 11, 1875, and the last receipt was dated August 21, 1883, and she admitted that the rent was paid to her in full from the time of her husband's death to September 2, 1883.

The land is referred to in the lease as situated in the Ili or Ahupuaa of Paauiio, Hamakua, Hawaii.

The receipt dated Hilo, December 13, 1875, is as follows :

"Received of Mr. Chas. Notley the sum of \$27, the same being for rent of land called Paauiio, in district of Hamakua, Hawaii, viz., for twelve months' rent to September the first, 1875.

"MARY ANN KENWAY."

The other receipts are similarly worded. The receipt dated Onomea, Hilo, September 9, 1878, is as follows, manifestly written in her own hand :

"MR. C. NOTLEY—Sir: I have this day received the sum of \$50 in full, the same being for the rent of my land on Paauiio, commencing on the 2d of September, 1877, and ending on the first of September, 1878. Yours truly,

"MARY ANN KENWAY."

She testified that she had never seen the lease presented to her, and on file, but had often heard of it from her husband, and knew that it included the land in suit.

By the deed to George S. and Mary Ann Kenway, they became owners of the land therein described by entireties (see *Paahana vs. Bila*, 3 Hawn., 725), and upon his death in 1872 his wife became the sole owner thereof as his survivor. The defendant claims that, by virtue of the receipts for rent as shown, Mrs.

Kenway has ratified the lease he holds by assignment, and that he can thereby hold the possession of the land as lessee. The plaintiff claims that this is not so. That at the best the rule of ratification claimed by the defendant is in doubt on the authorities, and that the more reasonable rule, in strict law, is that the lease, which the widow did not execute, was void at her husband's death, and can in no way be revived or ratified.

By law in this country, up to the time of his death George S. Kenway had the right to the rents and profits of the land in question, and the right to lease the same, and his wife had no power to make a contract to lease it without his consent. Had she signed and not acknowledged it, in England and in many of the United States, her signature would have been of no effect, and she might have refused to be bound by it, either before or after her husband's death. It is admitted by the counsel for the plaintiff that had she so signed this lease either in England or the United States, her subsequent acceptance of rent as shown would have been a valid ratification of it.

The text books and authorities cited amply prove this to be so. Also the text books cited by the defendant's counsel say, "that a lease made by the husband of his wife's land for a term that extends beyond his own life is not void as to the wife, but on his decease she may elect whether to affirm or defeat it, and if she accepts rent accruing thereon after her husband's decease, she will thereby be estopped from denying the validity of the lease for the balance of the term."

This is substantially maintained by Wood's Landlord and Tenant, p. 163; Taylor on Landlord and Tenant, Sec. 102; Bright on Husband and Wife, p. 197; Bishop on Married Women, Vol. 1, Sec. 547; and Bright also cites Jarman on Conveyances as sustaining this view of the law.

On examining the authorities cited by these text writers, however, several of them are found to be of cases where the lease was executed by the wife, defectively, which the plaintiff claims is a fatal difference for the defendant. Other cases cited, however, sustain the doctrine of the text books, and the defendant claims that they contain the better rule, and that the other rule is technical and unreasonable.

The strongest statement that we have found for the plaintiff's position appears in *Jackson vs. Holloway*, 7 Johns. 186, in which case a lease had been made by the husband alone, but thereafter a lease was made and properly acknowledged by both the husband and wife, and the husband died. The wife had accepted rent of the first lessee after her husband's death, and the Court held that, by the lease subsequently made, which was valid, the right of the widow to confirm or ratify the first lease was taken away.

The Court, Thompson, J., said: "It would seem a little incongruous to speak of a deed as voidable by a person who was not a party or privy to it, nor had any agency in its execution. The very term implies some agency in the act which is to be avoided. But it is unnecessary to give any opinion on this point."

Although this is *obiter dictum*, its reasoning must be considered, and in a bald case of execution by a husband alone, with covenants running to him alone, it may be it ought to prevail.

It seems, however, a narrow construction which terms that a signature which is of no legal effect whatever when made.

A case throwing light on the matter is *Goodright vs. Strathan*, Cowper, 204.

In that case the instrument executed, though in form of a lease for 99 years, by husband and wife, was in substance a mortgage; it was therefore held absolutely void, and not voidable as though a lease, which was held voidable by the ancient rule in favor of agriculture and tillage. But Lord Mansfield said: "In conscience she has confirmed this security, which was entered into for the maintenance and support of herself and family."

And it was held that her acts, after her husband's death, of surrendering possession in writing to the mortgagee of the land, and in an account stated, allowing interest on the mortgage, and also in directing the tenant of the land to *attorn* to the mortgagee of the property, were equivalent to a confirmation of the mortgage "upon the ground of their being equivalent to a redelivery of the deed."

See also *Doe vs. Howland*, 8 Cow. 277, where an acknowledgment by a widow, after her husband's death, of an unacknowledged signature made before his death, was held to take effect as of the time she acknowledged it.

In the case at bar, however, there was a covenant to pay rent to Mary Ann Kenway and her husband, and also that she and her family might occupy buildings and use valuable parts of the land necessary for their own purposes, and a covenant to repair those buildings, as quoted. Mrs. Kenway, beyond question, had a right, after her husband's death, to accept of those covenants for the benefit of herself and her family. They are like a deed-poll to her of real estate of value. In such case she would be presumed to accept it unless she expressly dissented.

Bishop on Married Women, Section 540, says :

"If, therefore, a lease of the wife's land is made by the husband and wife jointly, or by the husband alone, and the lessee covenants to pay the rent to the wife or to the husband and wife, the husband may sue for the rent in his own name alone, or he may join his wife with him, or, if he dies before suit brought, she may sue for it in her own name, and recover it to her own use." If, when Kenway died, there were rents due, Mrs. Kenway, on this covenant to her, in a lease she did not execute, could sue and recover in her own name. So here, having received rent due after her husband's death, she thereafter, we doubt not, may continue to receive the rent under the covenant to her.

"It has been held that a party to an indenture made and executed by another to him, will become a covenantor, and liable as such, though he may not sign and seal the deed, if he is named in it, and accepts it, and it contains covenants which by the terms of the deed he is to perform."

Martindale on Conveyancing, Sec. 61, citing *Finley vs. Simpson*, 22 N. J. L. 311 ; also *id.*, Sec. 220.

"A deed void when delivered may be ratified and confirmed by the grantor, after he has full knowledge of the facts, by any word or act of his which shows a clear intention on his part that the deed shall be considered as having been properly executed and delivered and as conveying the title to the property."

But the plaintiff's counsel claims that Mrs. Kenway is not bound by the receipts, because when made she did not know her rights as to the lease. We think she certainly knew all the substantial facts about it.

She knew that the land was hers solely after her husband's

death, and that she had personally executed no lease of it, and that her husband had made a lease dated September 2d, and that the rent was fifty dollars a year; and she must have known of the covenants to repair the buildings by the defendant, and of her right to occupy them and the adjacent land with her family.

Knowing all these facts, she must be presumed to have known that there was no lease binding on her.

The maxim "*Ignorantia legis neminem excusat*" applies with force to her, especially after these repeated acts recognizing the lease.

See Story Eq. Jur., Sec. 111.

Under the English law formerly, a will which was not signed at the end of it, but contained in the body of it the name of the testator, he having declared it to be his will, was a valid will. The name of Mrs. Kenway appears as a covenantee in this lease. If she substantially knew the contents of the lease, the receipts which she so repeatedly signed may be considered as written upon the lease, and they constitute a ratification of it, and an acceptance and confirmation of its covenants; which it would be most unreasonable to annul and set aside.

What may be the value of the lease at this time is not in evidence. The plaintiff's counsel claims it is now very valuable to the defendant. This may be so. But at the death of Kenway, in 1872, and for several years after, and up to the passage of the treaty with the United States, it would seem to us to have been, with all its conditions, a valuable lease to Mrs. Kenway, and she may well have thought it best to let it stand, as she did.

The counsel for the plaintiff has examined and presented the cases akin to the question at bar with great industry and ability. We have examined many of the cases to which he refers, but they fail to convince us that he is right, and for the reason above set forth the exceptions must be overruled.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, February 12, 1884.

MOTION FOR REARGUMENT.

On the motion for reargument the Court say that they doubtless

have a discretion to grant a reargument, and would do so in a proper case.

In *Mount vs. Mitchell*, 32 N. Y. 702, the Court of Appeals of New York adopted the rule that "Motions for reargument should be founded on papers showing clearly that some question decisive of the case, and duly submitted by the counsel, has been overlooked by the Court; or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not drawn through the neglect or inadvertence of counsel."

We think this a fair rule, and are willing to adopt it in this case.

The first claim of the counsel is that the Court overlooked the point made by him that the facts of the case should have been submitted to the jury, and that a verdict was directed by the Court.

The opinion does not mention the fact that this point was considered by the Court, but it was in fact so considered, and the objection was deemed untenable. The Court still think that it was so. There were no disputed questions of fact in the case. The Court then, and on the appeal, held that as matter of law, upon the undisputed facts, the defendant was entitled to a verdict, and a verdict, therefore, was directed. This is now the universal rule. Also, in our view of the law, a verdict for the plaintiff should have been set aside, and in such a case we have recently held that the direction of a verdict would have been proper.

See *Kamalu vs. Lovell*, *ante*, 62.

Every point made by the plaintiff's counsel on the argument was fully considered by the Court, though all were not mentioned in the opinion. He now says he thinks that the effect of the statute of frauds upon the question at bar was not fully apprehended or considered by the Court. We have again examined the question in this aspect of it, and still believe, as we thought before, that for the reasons stated in the opinion the statute of frauds does not necessitate the reversal of the judgment below.

The counsel refers to a statement of the Court as to the former English statute of wills, and cites Redfield on Wills as showing error. On looking at the place referred to we find the law laid down exactly as it was stated from memory by the Court. The

citation was made as an aid and an illustration and not as controlling, and we still think it was appropriate for that purpose.

We think the plaintiff's papers do not bring his motion within the rule we have adopted, and it is denied.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, February 25, 1884.

LOO CHIT SAM *et al.* vs. WONG KIM.

APPEAL FROM COMMISSIONERS OF WATER RIGHTS.

JANUARY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The Court has only appellate jurisdiction from decisions of Commissioners of Private Ways and Water Rights, and will not on appeal complete a decision which was never made.

The principal duty of Water Commissioners is to determine upon evidence and to define what were the ancient and prescriptive rights in controversy.

To decide that certain lands are entitled to the water they have enjoyed by ancient custom, and not to say what proportion of the general water supply this may be, is not sufficient.

Case remitted to the Commissioners.

OPINION OF THE COURT, PER JUDD, C. J.

THIS is an appeal by defendant from a decision of the Commissioners of Private Ways and Water Rights for the district of Honolulu, concerning certain water rights in Palolo Valley.

The Commissioners sat five days for the hearing of evidence and also visited the *locus in quo*.

By the map in evidence it appears that the matter to be settled was the water rights from several ditches or water courses, and claimed by many different individuals.

The decision of the Commissioners is as follows :

1. "That at the upper ditch of all, sufficient water be taken out of the stream to water the patches on Mahoe's kuleana and crown patches adjoining, and the overflow to run back into the stream.

2. That the new ditch dug by Wong Kim from the spring in the taro patch on Mahoe's kuleana to the Wailupe ditch be done away with, and the overflow from this patch to run into the stream.

3. Open the head of the Wailupe ditch that has been closed up.

4. That the defendant take sufficient water through the Wailupe ditch to water all land in Kaauwaeloa that was planted in taro during the time that said land was in Webster's possession and up to the time of the land coming in possession of the defendant.

5. After the defendant (has) taken out the above water the balance be allowed to run down the stream.

6. That a part of the dam in the auwai from Waiomao be taken away so as to allow the proper amount of water (according to the ancient division) to come through the auwai to the Pukele stream.

7. That the Keaunaia dam be lowered or opened so as to allow the upper (proper) proportion of water according to the ancient division to pass down the stream to Kukekia dam.

8. That the water be taken out at the Kukekia dam to water patches in Kaauwaeloa adjoining the stream and patches on land below on the northwest side of stream. The division of the water to be according to the ancient water days."

Mr. Smith for the defendant, appellant, objects to the first point of the decision and contends that the evidence shows that one-quarter of the water should be allowed to be supplied to the Mahoe kuleana and the crown patches, and that one-quarter should be allowed to flow down the old Wailupe ditch, or west gulch, one-quarter down the main stream and one-quarter down the Waimano ditch.

The defendant has land below, called "Kaauwaeloa," for which he claims water through the old Wailupe ditch, and so contends that one-quarter of the water should be allowed to run down in this ditch to this land.

The difficulty is that the Commissioners decide in point one that all the water not used on the Mahoe kuleana and crown patches should flow down the "main stream" (not the Wailupe ditch),

and yet in point *four* of the decision say that the defendant "take sufficient water through the Wailupe ditch to water all land in Kaauwaeloa that was planted in kalo in Webster's time," etc.

We are at a loss to see how, if all the water not used on Mahoe's kuleana and crown patches is to flow down the main stream, any water can be taken for the Kaauwaeloa land through the "Wailupe ditch," since the springs in the Mahoe kuleana and the Pukele springs above them constitute the whole source of supply of water for both the "main stream" and the "Wailupe ditch." Moreover, the decision in point *four* is too indefinite to be of any value. It leaves undecided one of the very points in controversy. It reads that defendant is to "take sufficient water to water all land in Kaauwaeloa that was planted in taro during the time that said land was in Webster's possession and up to the time of the land coming in possession of the defendant."

The Commissioners do not determine how much water would be sufficient for this purpose, and we do not find any evidence on record that would enable us to make any decision upon it.

Points five, six, seven and eight of the decision of the Commissioners are open to the same objection. The expressions used, "proper amount of water," "proper proportion of water according to the ancient division," "the division of the water to be according to the ancient water days," leave the vital questions of the amount of water thus attempted to be regulated and distributed subject to further litigation.

This Court has only appellate jurisdiction in such matters, and so far as the above portions of the decisions are concerned there is really nothing definitely decided and no evidence sent up upon which this Court can make a definite judgment.

The principal duty of the Water Commissioners is to determine upon evidence and to define what were the ancient and prescriptive rights in controversy. Now, to announce that certain lands are entitled to the water that they have enjoyed by ancient custom and not to say what proportion of the general water supply this may be, is simply to enunciate a principle of law.

We do not consider it the province of the Supreme Court to complete on appeal a decision which was never made.

Points two and three of the decision are conceded to be correct

by the appellant, and we understand that the orders therein made, as to closing the new ditch from the spring in Mahoe's kuleana to the Wallupe ditch and opening the head of the Wallupe ditch, have been complied with.

As to these points (the second and third) the decision of the Commissioners is affirmed; as to all the others the case is ordered to be remitted to the Commissioners for determination as to quantity of water, which may be defined and measured either by time of use or in any other way as shall seem just to the Commissioners, according to the rights of the respective parties.

F. M. Hatch, for plaintiffs.

Smith & Thurston, for defendants.

Honolulu, February 11, 1884.

MAIKAI *et al.* vs. A. HASTINGS & CO.

APPEAL FROM COMMISSIONERS OF WATER RIGHTS.

JANUARY TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

Holders of awards of the Land Commission are entitled to water for irrigating purposes from the stream in the land in which their kuleanas are situated. Tenants at sufferance under the konohiki must look to him for their supply of water.

OPINION OF THE COURT BY JUDD, C. J.

ON appeal from Commissioners of Water Rights for the District of Ewa, Oahu.

We are of the opinion that the petitioners, Maikai, Waikane and Pauli, and also Kahalemake, who did not sign the petition, are entitled to water from the Makaha stream in Waianae, with which to irrigate the lands held by them. All these persons are holders of kuleanas, awarded by the Land Commission.

The other petitioners are hoainas or tenants at sufferance under the Konohiki, and they must look to him for their supply of

JANUARY, 1884.

water. By the lease from him to the defendant's assignors, it appears that he has parted with his right to the water, reserving only two hours' use of the same for his own kalo lands, and reserving (what he could not dispose of) the water for native kuleana holders, the exact expression in the lease being, "sufficient water for all kuleana rights."

It is difficult to estimate exactly how much water will be required to supply the parties to whom we award it, but the best conclusion at which we can arrive is that the plaintiffs are to have the use of all the water from Makaha stream from 7 o'clock p. m. of every day to 12 o'clock midnight, and the rest of the time the defendants are to have the use of the water. The kono-hiki is to take his water out of the time allotted to defendants.

J. A. Nahaku, for plaintiff.

F. M. Hatch and *C. Brown*, for defendants.

Honolulu, January 31, 1884.

KELIUKANAKAOLE *vs.* KAWAA *et al.*

APPEAL FROM THE CHANCELLOR.

JANUARY TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

A reservation for life, by the grantor, of two houses on the land conveyed by him, is a reservation for life of the lots of land on which they stand.

The lot conveyed was described as one-third of the land: Held that the lot intended to be sold should be considered as bounded by the fence separating it from the reserved lots, as the line dividing off an actual third would cut off the edge of a house erected almost entirely upon the part unsold, and rented to tenants.

OPINION OF THE COURT, BY AUSTIN, J.

This is a bill in equity brought to set aside a deed executed by the plaintiff of certain lands in Honolulu, upon the ground that

when he executed it he was told and believed that it was a will, which he alleges was the paper he intended to execute, and that the defendants conspired to procure said deed of the plaintiff, and that thereby he was cheated and defrauded.

The defendants deny all fraud and conspiracy.

The Chancellor, in the court below, decided in favor of the defendants, and from the decree entered thereon the plaintiff appeals to this Court.

On reading the evidence, and the paper executed by the plaintiff, which is attacked, we are convinced that the plaintiff executed it well knowing that it was a deed and not a will. It is in form of a deed; it mentions a consideration of \$1, and sets forth an agreement by defendants to support plaintiff during his life, and it reserves to the plaintiff for life two houses erected on the land conveyed. The proof is conclusive that the paper was read over to the plaintiff at the time of its execution. He had before executed a will. It is impossible to believe that he did not know that this paper was a deed.

The land conveyed is spoken of as one-third of certain land and premises. Upon "B," as specified in the plan in evidence, the houses reserved were erected. "B" is separated on the plan from "A," the part not sold, by a fence. We think "B" and "C" may be construed to be appurtenant to the houses. Doubtless, before the new street was cut, "B" and "C" were in one lot adjacent to the houses. We think the reservation of the houses may properly be construed to include as a reservation for life the lots "B" and "C."

It is said that an actual third, as conveyed, would go beyond the fence between "A" and "B," and would strike off the edge of a house certainly almost entirely erected on the part unsold, and which is rented to tenants by the plaintiff. The land sold is not described by metes and bounds. We think that it was not intended to strike off that edge, and that the land intended to be sold is bounded by the fence erected between "A" and "B."

R. F. Bickerton, for plaintiff.

J. L. Kaulukou, for defendant.

Honolulu, February 1, 1884.

J. F. HACKFELD *et al.*, Assignees of Kun Sai & Aming, Bankrupts, *vs.* ING CHOI *et al.*

APPEAL FROM THE DECISION OF THE CHANCELLOR.

JANUARY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Kun Sai, of the firm of Kun Sai & Aming, prior to the bankruptcy of the firm, transferred his interest in certain property, not a partnership asset, to Ing Choi, the bookkeeper of the firm; such transfer held void, as being in fraud of creditors.

Ing Choi claimed that he paid certain private debts of Kun Sai, as part of the consideration for said transfer: Held that he could receive this amount, by subrogation, out of assets realized by the assignees in bankruptcy from the private estate of Kun Sai, before payment of partnership debts.

Decision of the Chancellor affirmed.

OPINION OF THE COURT, BY AUSTIN, J.

This case is here on an appeal from a decree entered on the decision of the Chancellor in equity, setting aside a deed of a moiety of a rice plantation and outfits, situated at Punaluu, Koolauloa, Oahu, executed by the bankrupt Kun Sai to the defendant Ing Choi, for a consideration of \$2,000, and a mortgage for \$900, executed by said Ing Choi to the other defendants, upon the ground that they were fraudulent as to the creditors of the said bankrupts.

On reading the evidence taken in the Court below, and the opinion of the Chancellor thereon, we see no reason to disturb his finding on the facts, and we adopt his opinion.

The decree directs that the deed and mortgage be cancelled, and that the property be sold by the assignees, and that the proceeds be applied, first, as the property was the private property of Kun Sai, to the payment of his private debts, and after to the payment of the firm debts of the bankrupt.

This decree is in exact accordance with the provisions of Sec. 992 of the Bankrupt Act. As the deed and mortgage are de-

clared fraudulent, it is as though they had never been made, and the property they referred to is to be sold as decreed.

The attorney for the defendant Ing Choi claims that the proof shows a payment, as part of the consideration of the \$2,000, by him by direction of Kun Sai, of Kun Sai's private debts, to the amount of \$1,664 80, and claims that this sum ought to be treated as properly paid, and that the balance only above that sum should be applied to the payment of the firm debts. As the deed and mortgage were both held fraudulent and void, we cannot here and now recognize any payments which may have grown out of their execution.

The only decree which could properly be made in the case is the one entered. When the funds arising from the sale of this property shall be realized by the assignees, we think Ing Choi may be entitled to receive by subrogation, first, out of those funds, if sufficient therefor, the sum of all honest private debts of Kun Sai which may have been paid or settled for by him.

Honolulu, January 30, 1884.

DECISION OF THE CHANCELLOR, APPEALED FROM.

The bill as amended avers that on the 1st September, 1882, Kun Sai & Aming were adjudged bankrupt, and the plaintiffs elected as assignees on the 16th of October; that on the 23d March, 1882, Kun Sai, by a deed of that date, sold and assigned to Ing Choi, for the consideration of \$2,000, all his interest, being a moiety, in a rice plantation and outfits at Punaluu, Koolauloa, Oahu, known as the Ahuna Rice Plantation; that the firm of Kun Sai & Aming had committed many acts of bankruptcy prior to the sale above mentioned; that Ing Choi was the firm's book-keeper, and was well aware of this, and that the deed was made with the intention of defrauding the creditors of the firm, and that the consideration in the deed was never paid; that on the 25th day of March, 1882, Ing Choi executed a mortgage on the above-described property for \$900 to the Kaalaea Rice Mill Company, and that the said company were aware of the acts of bankruptcy of Kun Sai and of Kun Sai & Aming, and that the deed to Ing Choi was made for the purpose of depriving their creditors of the property, etc. The bill prays that the deed and mortgage be delivered up for cancellation.

I find the facts to be as follows: The firm of Kun Sai & Aming were insolvent on the 23d March, 1882, and had been so for some time. They had committed many acts of bankruptcy in suffering promissory notes and quarterly accounts to the amount of thousands of dollars to remain unpaid for ten days and more after the same were due. That many of these notes were renewed or their times of payment orally extended, and that no one brought suit on them, does not deprive these acts of their character of acts of bankruptcy. It may be that no creditor wished to take the initiative. But the notes in favor of H. Hackfeld & Co. of over \$900 are dated in August and October, 1881, and were all due before the 23d March, 1882, and were demanded when due and were not paid, and not renewed or extended.

So also there are in evidence notes of this firm to Sing Chong & Co., made in August and September, 1881, and due before the close of the year, for over \$600. In fact, of the whole account of Sing Chong & Co., amounting to \$5,274 94, it all appears to have been due before March, 1882, but the sum of about \$1,000. Tuck Ong, of the firm of Sing Chong & Co., says that the amount of some \$3,400 had been owing them by Kun Sai & Aming for about three years, and they had incurred this liability to them by reason of Sing Chong & Co.'s indorsing their notes to H. Hackfeld & Co.

Kun Sai had personally committed acts of bankruptcy in not paying his note to Wong Kwai, but whether he individually owes a sufficient sum (\$2,000) to have been made a bankrupt does not appear.

Ing Choi was the firm's bookkeeper. Aming was mainly on Kauai. When Kun Sai could not be found, Ing Choi would negotiate with the creditors for an extension of the firm's notes. The firm's books are not shown to have been made up since 1st September, 1881, when their assets were \$12,494 13, their liabilities \$12,178 18, with the small margin to the good of \$315 68. Ing Choi entered the bills payable, and must have been thoroughly conversant with the condition of the firm, and took the deed with full knowledge that Kun Sai was insolvent. Kun Sai himself says he had to borrow money to pay his passage here

from China, and borrowed \$200 from Wong Kwai to repay it, and this amount was assumed by Ing Choi in his settlement of the purchase money for the rice plantation. In fact, the expedients resorted to in the settlement of this consideration of \$2,000 are very significant. To discharge \$900 of it, Kun Sai directs Ing Choi to pay one Akuna, whom Kun Sai owed; but Akuna owed Phillips & Co., but could not pay; so Sing Chong & Co. authorize Phillips & Co. to charge them with this amount, and take a mortgage therefor to themselves and other partners in the Kaalaea Rice Mill Company, on the interest in the rice plantation bought by Ing Choi, and take a further agreement from Ing Choi and Akuna (the owner of the other half) for a sale and delivery to them of three successive crops of rice at market rates.

It seems to me that the letter of Phillips & Co.'s attorney to Akuna, urging for payment of his mortgage of \$1,200 in their favor, was the pressure which forced this sale. It is evident to my mind that Kun Sai and Ing Choi arranged all the terms of this settlement with Sing Chong & Co., as well as with Akuna and Phillips & Co., before the sale of the plantation, March 23d, and that all these papers, the deed, mortgage and agreement, should be considered as forming one transaction. (See *Johnson vs. Tisdale*, 4 Haw. 605).

I am of the opinion that Tuck Ong was well aware of the bankrupt and insolvent condition of Kun Sai and of Kun Sai & Aming when he took the mortgage, notwithstanding his disclaimer.

Over \$15,000 of claims have been presented against the bankrupt firm. But as this plantation interest was not partnership property, but the private estate of Kun Sai, I shall hold the bill until the assignees report, showing assets and liabilities of the firm; and if the latter exceed the former, I shall order the deed and mortgage to be cancelled, and direct the assignees to sell Kun Sai's interest in the plantation, and apply the proceeds, first, toward paying private debts, if any are proved, and then toward the firm's debts.

R. F. Bickerton, for plaintiffs.

W. R. Castle, for Ing Choi.

Cecil Brown, for Kaalaea Rice Mill Co.

Honolulu, May 2, 1883.

APRIL, 1884.

M. REIS *vs.* J. WENDEL.

APPEAL FROM POLICE COURT, HONOLULU.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The plaintiff sought to recover damages to his carriage and for loss of its use, occasioned by the furious and reckless driving by the defendant in a public street.

The defendant offered to prove in defense that at the time of the accident the parties were returning late at night from a "hula" dance promoted contrary to law by the plaintiff.

The Court below excluded the testimony.

Held that such evidence afforded no defense, and that the Court below was right in excluding it.

OPINION OF THE COURT, BY AUSTIN, J.

ON appeal from the Police Court of Honolulu.

The plaintiff sought to recover below for damages to his carriage and the loss of its use by the furious and reckless driving by the defendant of his horse and carriage in one of the streets of Honolulu.

The defendant offered to prove in defense that when the accident occurred the parties were returning late at night from Wai-kiki, where they had been attending a "hula" dance, contrary to law, which the plaintiff had originated and promoted.

The testimony was excluded by the Court, and from this the defendant appealed on this point of law.

The defendant claims that the evidence offered would have been a defense within the principle of those cases which hold that one engaged in an unlawful undertaking cannot recover for injuries occurring to him by the negligence of another similarly engaged. We think this principle has been carried too far in many cases. A rule which withdraws a man and his property from the ordinary protection of the law ought not to be lightly established.

It is sufficient to overthrow the defense offered here to say that

when the injury recovered for was done, the parties had left the "hula" and at that time were not engaged in any unlawful act.

Further, "the general principle which allows defenses in such cases is that a party cannot maintain an action when his own illegal act must be shown as a part of his case and to make out his claim."

Gregg vs. Wyman, 4 Cush., 327.

In the case at bar no such proof was necessary. The first heard of the "hula" was from the offer of the defendant.

Again, in *Steele vs. Burkhardt*, 104 Mass., 63, Chapman, C. J., says: "And it is true generally that while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries willfully or carelessly done to him and to which his own conduct has not contributed."

This principle is fatal to the defendant.

See also *Hall vs. Corcoran*, 107 Mass., 260; *Welch vs. Wesson*, 6 Gray, 505; where the doctrine is fully sustained.

The Court in *Sutton vs. Wautosa*, 29 Wis., 21, say: "To make good the defense (of illegality) it must appear that a relation existed between the act of violation of law on the part of the plaintiff and the injury or accident of which he complains, and the relation must have been such as to have caused or helped cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to precede or follow another."

Cooley on Torts, p. 155.

We think this principle is sound and decisive of this case. The fact that plaintiff, some time previous and in a remote spot from the place of collision, had promoted an unlawful "hula," has no relation, that we can see, to the collision, nor did it in any way contribute to it.

The judgment must be affirmed.

F. M. Hatch, for plaintiff.

J. M. Davidson, for defendant.

Honolulu, April 7, 1884.

THE KING *vs.* C. Y. AIONA AND APOI.

APPEALS FROM CIRCUIT JUDGE, THIRD JUDICIAL CIRCUIT.

QUESTION RESERVED.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

An appeal lies from a decision of a Circuit Judge at Chambers to the Supreme Court.

OPINION OF THE COURT, BY McCULLY, J.

THIS case being on the calendar of criminal cases at the present term, the Attorney-General moves the Court to dismiss the appeal for want of jurisdiction. The Chief Justice, holding the term, reserves the question.

It is an appeal from a conviction before one of the local Circuit Judges in Chambers, of the Third Judicial Circuit, for violation of the Act relating to the sale of spirituous liquors. The appeal is taken generally on the facts as well as the law, under the provisions of Sec. 1007 of the Civil Code, as follows: Any party deeming himself aggrieved by the decision of any Circuit Judge at Chambers in any case, whether civil or criminal, may appeal therefrom to the Circuit Court or the Supreme Court by giving notice, etc., provided always that when such appeal is taken solely upon exceptions to the decision of the Circuit Judge on points of law, the appeal shall be heard and determined by the Appellate Court in Banco. Sec. 1006 contains a like provision for appeal from any police or district justice to the Circuit or Supreme Court.

Taking these provisions as they stand, and disconnected from all other enactments, there would seem to be no ground for any other construction than that there was a right of appeal, in every case tried by circuit judges and police and district justices, to either the Supreme Court or the Circuit Court as the appellant might elect. It is the direct meaning of the words employed.

But the common practice during the twenty-five years of the existence of the Code has been that appeals, particularly in Crown

cases and upon the facts, so requiring jury trial, are taken to the Circuit Courts of the three circuits when there are such Courts, and to the Supreme Court only in cases arising in the inferior Courts of Oahu; although it appears that this common practice has not been without exception, yet the question of jurisdiction has not hitherto been raised.

The Civil Code, as it was enacted in 1859, continued the previous division of the Kingdom into four judicial circuits, of which the Island of Oahu was the first, and provided for each a Circuit Court with a term or terms thereof. The Circuit Court of the first circuit was to be held at Honolulu on the first Tuesday in August of each year. By Act approved January 10, 1865, the Circuit Court of the first judicial circuit was abolished for this reason, stated in the preamble, "whereas from the residence and frequent sessions of the Supreme Court in the Island of Oahu, the Circuit Court for the first judicial circuit has fallen into disuse and is deemed unnecessary."

The Act provides for the same appeals, which continued in the other circuits, by the creation of an Intermediary Court.

The prosecution mainly base the motion on Sec. 881 of the Civil Code, which reads: "The criminal jurisdiction of the Circuit Courts shall be co-extensive with the circuits for which they were created. It shall be appellate from the district and police courts thereof, in all cases recognizable before those Courts, and original in other cases."

The Supreme Court, in *The King vs. Puhukoa*, October, 1866, refused jurisdiction of an indictment charging the defendant with a felony committed within the fourth judicial circuit, the indictment not being brought before the Court by change of venue from that circuit. The argument is made that the provision for an appeal to the Circuit Court or the Supreme Court did not give an alternative appeal, but was dealing in the same section with two subjects, employing somewhat loose and inaccurate language, however, and should be construed to intend that appeals should be taken to the several Circuit Courts in the circuits where they existed, and to the Supreme Court in the first circuit.

But against this view there is the immediate objection that at the date of the Civil Code there was a Circuit Court for the first

circuit. No phrase is used which limits the appeal to the Supreme Court to cases arising only in the first circuit. In Sec. 999 the appeal from decisions of Commissioners of rights of way is "to the Circuit Court of the Island, or, if the controversy is on the Island of Oahu, to the Supreme Court," and an alternative appeal was only provided by a later amendment allowing appeals "to the Circuit Court of the respective circuits or to the Supreme Court." So appeals from the Boundary Commissioners were made expressly and exclusively to the several Circuit Courts in all the circuits except the first, when they were expressly made to the Supreme Court. These are illustrations of the fact that the intention of the Legislature as to the course of appeal may be made, and is made, by apt and plain words, admitting of no doubt as to what is granted.

By Sec. 829 the Supreme Court has jurisdiction in all cases in law or equity, civil or criminal * * * * whether the same be brought before it by writ, appeal or otherwise. This language is not, in our view, limited by the terms of Sec. 881, quoted above, whereby a certain jurisdiction is given to the Circuit Courts, for it is not made exclusive to them. Sections 829 and 881 must be taken together, and they give to the Courts appellate jurisdiction co-extensive with their circuits, and to the Supreme Court appellate jurisdiction co-extensive with the Kingdom, and also concurrent with each circuit.

The learned Attorney-General admits in argument that the proviso clause in Sections 1006 and 1007 gives an appeal from the lower Courts on points of law to either the Supreme or respective Circuit Court, in Banco. Such is the direct import of the language. But we cannot see that the provision for general appeal is given in a different way.

The right of appeal depends wholly on the Statute. If the Statute gives it to the Supreme Court, even in every case which is heard by the lower magistrates and by the circuit judges, we cannot deny it upon any considerations of the inconveniences which may arise from the possibility of bringing an undue proportion of business to the Supreme Court and of drawing witnesses and appellees to a distant forum. The highest court of a country will not favor a construction by inference which narrows its own juris-

diction; moreover the argument of "inconvenience" may be offset by the consideration that justice may require, for the proper adjudication of important questions which may be involved in cases coming before the lowest courts, that they be carried before the highest tribunal and there settled for law upon the fullest arguments and authorities which can be presented. And our reports show numerous instances where this course has been pursued, to some of which counsel for the defendant calls our attention. We do not find that plea was raised to such appellate jurisdiction. The Court proceeded on the direct and literal construction of Sections 1006 and 1007 without question.

Upon full consideration of the premises we are of the opinion that the other sections of the Code, which have been cited against this construction, do not authorize any other construction than the plain, unambiguous one hitherto taken. Our opinion is that the appeal in the case before us is properly taken, and we *overrule the motion to dismiss*.

Attorney-General Neumann and *W. A. Whiting* for the Crown.
A. S. Hartwell for defendant.

Honolulu, April 16, 1884.

THE KING *vs.* ALIONA.

The facts of the case being similar to those of *The King vs. C. Y. Aiona and Apoi*, this day decided by us, the motion to dismiss the appeal herein is denied for the reason expressed in the opinion in the former case.

Honolulu, April 16, 1884.

NOTE. See Art. No. LXII of the Session Laws of 1886, amending Law as to appeals.

APRIL, 1884.

ESTATE OF JOHN BOARDMAN, DECEASED.

APPEAL FROM FORNANDER, CIRCUIT JUDGE, SITTING IN PROBATE.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A testator devised property to his daughter, to be held in trust for her by his executors, free from control of her husband, should she marry. At the testator's death, the daughter was married.

Held, that a valid trust, to the separate use of the daughter, vested in the executors, to pay the income from the property to the daughter during her coverture.

Decree of the lower Court reversed.

OPINION OF THE COURT, BY AUSTIN, J.

THIS matter comes here on appeal from the decree of distribution made by Hon. A. Fornander, Circuit Judge, Maui.

The question submitted is the construction of the second clause of the will of Boardman, which is as follows :

"I give and bequeath to my daughter Amy Laura one half of my land in Makawao, of about 400 acres, one large bedstead and bedding, one bureau, one table, one camphor trunk, the small clock, and one half of all my money and other personal property, with the same exceptions as in article 1st. This property to be held in trust for her by my executors, for her own use, free from the control or interference of her husband, should she marry."

The will is dated September 25, 1876, and John Boardman died on or about May 5, 1883. At the date of the will his daughter Amy Laura, named in the clause quoted, was unmarried. At the death of the testator she was married, and was Mrs. Laura King, wife of G. M. R. King. Mr. and Mrs. King claim that she is entitled to the immediate conveyance of the real estate, and distribution of the personal property left her by the will.

The Circuit Judge has so decided, and the executors appeal.

The English statute of uses, which is substantially re-enacted in most of the United States, is not made the law here. If, however, its provisions are deemed reasonable, they may be adopted by our Courts.

See Sections 14 and 823, Civil Code.

The effect of the statute is shown by the following illustration :
"If A grants or bequeaths lands to B and his heirs, in trust for C and his heirs, the trustee B will take nothing in the land, but the legal title and the beneficial use will vest immediately in C."

See Perry on Trusts, Sec. 298.

In a plain case like this we think the statute is wise, and that it should be followed here.

To the application of the statute in England and elsewhere, there are certain well-defined exceptions, or rather rules of construction, which limit the effect of the statute. One rule "relates to special or active trusts which were never within the purview of the statute. Therefore, if any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one—in all these, and in other like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates." Id. Sec. 305.

Under this rule it is well settled that equity will permit a stranger to give and settle property upon a married woman, to her sole and separate use, free from the interference and control of her husband. Id. Sec. 346.

To create such a trust, no particular form of words is necessary, but the intention to exclude the husband must be unequivocal, and when the meaning is clear the Court shall carry the intention into effect.

Id. Sections 310, 647, 648 and cases cited.

At Sec. 652, Perry on Trusts declares: "As before said, if property is conveyed to a single woman for her sole and separate use, she has the same control of it before marriage as if it was given to her absolutely; but the limitation to her sole and separate use will take effect upon her marriage."

This view is sustained by many authorities in England and in the United States.

It is also held in many cases that the trust applies to successive covertures, where the intention so to apply it is clear, though at the death of the first husband the widow has an absolute power of disposal.

See *id.* Sec. 653; *Shirley vs. Shirley*, 9 Paige, 364. See also Bishop on Married Women, Sections 814, 815, 816, 817, 821, 822 and 823.

At Sec. 814, this writer says: "In legal principle, and on the prevailing authorities, both English and American, it is competent to limit an estate to the separate use of a woman yet unmarried, where no particular marriage is contemplated, and on her afterwards becoming covert, she will hold it as her separate estate, free from the control of her husband." See also Perry on Trusts, Sec. 671. Such doctrines, if adopted, would enforce the trust in this case.

The counsel for respondents, however, as against these views, relies upon cases decided in Pennsylvania, and cited in Note 4 to section 652 of Perry on Trusts, where it is said that: "In that State, to create a valid trust for the sole and separate use of a woman, it is necessary that she should be married at the time, or that she should be in the immediate contemplation of a marriage." See also Perry on Trusts, Sec. 310, to the same effect. And the respondents' counsel claims that this applies to the case in hand, and is more reasonable than the other doctrine, and leads to the abrogation of the supposed trust.

We are not now prepared to say that the respondents' counsel is wrong, nor do we think it necessary to do so in order to decide the question before us.

The trust, if any, declared in this case is by will. The provisions of a will are ordinarily "ambulatory" until the death of the testator.

See Perry on Trusts, Sec. 92.

The rights of the executors as such, and as trustees, vested at the death of the testator.

Redfield on Wills, p. 126, Vol. 3.

The trust in this case, if valid, is strictly of a testamentary

character, and could not possibly arise or become vested until the death of the testator.

Redfield on Wills, Vol. 3, p. 482.

In the absence of express provisions showing otherwise, a will is to be considered with reference to the facts and circumstances existing at the death of the testator.

See Redfield on Wills, Vol. 1, pp. 379, 380, 413 and 414.

These are familiar and undisputed principles, and doubtless the rights of the devisee, legatee and trustees in this case became vested at the testator's death, and not before. At that time the respondent was a married woman, and the contingency mentioned in the will had occurred. The will speaks of her rights as they were affected by her condition at the time of the testator's death. If, then, the words used were sufficient to constitute a trust to the separate use of a married woman, the trust claimed by the appellant is established.

On looking at the language used in the will, we have no doubt it is amply sufficient to establish such a trust.

See Perry on Trusts, Sec. 648 and the instances there cited.

Holding it to be a trust, is in full accord with the decisions in the Pennsylvania cases, and with *Hasslocher vs. Robinson's Executors*, 3 Hawn., 802. It is a trust in favor of a married woman, in strict observance of the declared intention of the testator.

The executors retain the property invested with the trust to pay the income, rents and profits to the *cestui qui trust* during her coverture.

The decree must be reversed with costs.

F. M. Hatch, for executors.

P. Neumann, for Mrs. King.

Honolulu, May 26, 1884.

ESTATE OF KAUALII, DECEASED.

APPEAL FROM LYMAN, CIRCUIT JUDGE, SITTING IN PROBATE.

APRIL TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

An instrument in form of a deed, but intended by the maker to have effect only after his death, held properly construed as a will ; approving *Kapela vs. Hoohoku*, 4 Hawn., 513.

Although Probate Courts have jurisdiction to entertain a petition for revocation of probate of a will after the time for an appeal has lapsed, sufficient grounds should be alleged in the petition, and it must not be merely a method of gaining an appeal lost to the contestant by want of diligence.

OPINION OF THE COURT BY JUDD, C. J.

THIS is an appeal from a decision of Circuit Judge Lyman, refusing to revoke the probate of the will of one Kauaii, deceased. It appears that on the 28th of August, 1880, Judge Lyman admitted the will to probate and no appeal was taken by the contestants. On the 30th November, 1883, a petition to revoke the probate of this will was filed before the same Judge. Hearing was had on the 7th of March, 1884, and the case was submitted upon the record of the evidence upon which the Circuit Judge admitted the will to probate. No additional testimony was offered. It is claimed on the appeal to this Court that the instrument propounded as the will of Kauaii is not equivocal on its face, and is plainly in form a deed of conveyance from him to his wife, and has no testamentary character.

This Court decided in *Kapela vs. Hoohoku*, 4 Hawn., 513, that an instrument conveying land in the form of a deed, having been declared by the maker to be his will, and that it should take effect after his death, being attested by two or more witnesses, should be properly construed as a will.

Upon a review of the testimony taken we are of the opinion that the instrument in question was properly construed as a will. It is fully proven that it was intended by the maker to operate as

a disposition of his estate after his death. It is called a "Will" by the maker, and the conversation held at the bedside of the sick man, who was directing its making, all shows that it was so intended and made in the expectation of death, which occurred soon after. No consideration passed, but it is stated in the instrument to be \$10 and the faithful care by his wife of the testator "until the end of his life." One witness says that the maker said he wished to give all his property to his wife, for if he recovered there would be no harm in having made the will, and if he died it (his property) would be settled. Another witness says that one Mahiki objected to Kaualii making a will, saying that his relatives would not trouble his property. Kaualii said to Mahiki: "No. Make a will, lest you and other relatives disturb the property of my wife."

Having thus found that there was good ground for admitting the instrument as a will and no reasons shown for revoking its probate, the appeal must be dismissed. But we wish to say further that, while not questioning the jurisdiction of a Probate Court to entertain a petition for revocation of the probate of a will after the time for an appeal has passed, there should be alleged in the petition good grounds for making such a request. For example, the existence of after-discovered evidence or of some evidence which was not submitted to the Probate Court, which would place the matter in a new light and show the Court that a mistake had been made. In other words, the application for revocation must not be merely a method of gaining an appeal lost to the contestant by want of diligence.

In 12 Allen, 1 (*Water vs. Stickney*), the Court say that the English authorities recognize as sufficient causes of revocation, forgery of the will, fraud in obtaining probate, neglect or mismanagement in conducting the suit, or the production of a later will.

The Court say, further, that Courts of probate have undoubtedly the authority to correct errors in their decrees upon clear proof of fraud or mistake on points not actually presented and passed upon. Such we deem to be a proper exposition of the law.

Judgment of the lower Court confirmed.

F. M. Hatch and *C. Brown*, for petitioner.

W. R. Castle, for respondent.

Honolulu, May 22, 1884.

WM. COLBY *vs.* E. E. BAILEY.

APPEAL FROM POLICE COURT, HONOLULU.

APRIL TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

The defendant sold to the plaintiff the stock and goodwill of his business, and covenanted not to "enter into or carry on any retail business in Honolulu for three years, in a penalty and forfeiture of \$2,000," to be paid on any breach.

Held, affirming the judgment of the Court below, that the "penalty" was liquidated damages.

OPINION OF THE COURT BY AUSTIN, J.

THIS case comes here on appeal from the Police Court of Honolulu, where the plaintiff was non-suited, upon the ground that the Court had no jurisdiction.

The action was to recover damages for breach of covenant.

On the trial the plaintiff produced a contract between the parties, dated October 4, 1883, whereby the defendant sold the plaintiff, in consideration of \$5,000, all the stock, fixtures and goodwill of his business, known as "The Ten-Cent Store," carried on at 109 Fort street, Honolulu, and among other things covenanted and agreed as follows: "That I will not enter into or carry on any retail business in Honolulu aforesaid, for and during and until the full end and term of three years from October 23, 1883, and in a penalty and forfeiture of \$2,000, which said sum I do hereby bind myself, my executors and administrators to pay to the said party of the second part or his heirs, executors, administrators or assigns upon any breach of the said covenant."

The defendant claims that the sum of \$2,000, named in the contract, is liquidated damages, and so the suit should have been in debt to recover the whole sum, and that of the suit as brought the Court had no jurisdiction.

The plaintiff claims that the \$2,000 is a mere penalty and security for whatever damages should arise from breach, and claims

that he has a right to sue as he did, and to sue again as often as a breach should arise.

There are strong authorities which favor the views of both parties, and the question involved has given rise to many judicial differences; but after considerable examination we are convinced that the true rule which ought to govern in such cases is well laid down in *Saintor vs. Ferguson*, 7 C. B., 716, quoted in a note to Parsons on Contracts, Vol. 2, p. 434, second edition. "The defendant agreed not to practice as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of £500. It was held that the £500 was not a penalty, but liquidated damages."

Coltman, J., said: "Although the word 'penalty,' which would *prima facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement and the surrounding circumstances to see whether the parties intend the sum mentioned to be a penalty or stipulated damages. Considering the nature of the agreement, and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages."

The rule that the intent should govern, irrespective of the special words used or omitted, as shown by the nature of the agreement and the surrounding circumstances, seems to be approved by Parsons on Contracts, Vol. 2, pp. 434, 435, and by Greenleaf's Evidence, Vol. 2, Sections 257, 258.

This is followed in many cases. In *Chamberlain vs. Bagley*, 11 N. H., 240, it was agreed to pay \$500 as a forfeiture in case of breach, and it was held liquidated damages.

In *Holbrook vs. Torrey*, 66 Maine, 412, many cases are cited where the word "penalty" alone is used, and yet it was held to be liquidated damages. The rule stated is approved in *Dwinel vs. Brown*, 54 Maine, 468.

We shall adopt it for our guide in the case at bar.

Recurring then to the contract, it was an engagement to sell a retail business and the goodwill of it to the plaintiff, and the de-

fendant agreed not to engage in a retail business in Honolulu for three years ; and in a penalty and forfeiture of \$2,000 bound himself to pay to the plaintiff said sum upon any breach of the said covenant.

The damages in case of any breach are manifestly uncertain, and impossible of definite ascertainment.

And the defendant expressly agrees to pay said sum of \$2,000 in case of any breach. This shows a clear intent of the parties to treat the amount as stipulated damages.

See *Chamberlain vs. Bagley*, 11 N. H., 240.

We shall so hold.

The plaintiff further claims that he had a right to waive the balance of \$2,000 mentioned in the contract, and sue as here for \$260 damages. The suit is for unliquidated damages, and, if we are right, should have been for a fixed sum in debt. We think he could not at the trial so change the nature of his cause of action.

The judgment below is affirmed, with costs.

C. W. Ashford, for plaintiff.

W. A. Whiting and *W. R. Austin*, for defendant.

Honolulu, May 29, 1884.

In re BOUNDARIES OF THE AHUPUAA OF PAAKEA.

APPEAL FROM BOUNDARY COMMISSIONER OF OAHU.

APRIL TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

A person taking a Mahele Award of an Ili of land, described by metes and bounds, is precluded from claiming anything more as belonging to the Ili.

Boundaries of Kewalo, 3 Hawn., 9, followed.

The Court, upon consideration of the evidence before the Commissioner, finding that it sustained the appellant's case, reverses the decision of the Commissioner.

OPINION OF THE COURT, BY McCULLY, J.

By appeal from the Boundary Commissioner of Oahu. The application for settlement of boundaries is made by Mrs. Bernice Pauahi Bishop, her husband joining in the petition. The claim of the petitioners is opposed by the Government in respect to the boundary line on the western, that is, the Honolulu, side of the land.

The determination of the controversy depends mainly on the finding as to what may be termed an issue—namely, whether the disputed territory falls within the Ili of Keauhou or the Ili of Paa-kea, both being Ilis or ancient divisions of Waikiki.

The Ili of Keauhou was awarded to Haumea pursuant to the "Mahele" or division of lands between the King and Chiefs, and the award issued by surveyed metes and bounds. This surveyed grant does not include the disputed territory. By the authority of the case of *Boundaries of Kewalo*, 3 Haw., 9, Haumea, having accepted for the Ili of Keauhou certain surveyed premises, would be precluded from claiming anything more as belonging to Keauhou. No claim is made on behalf of Haumea, but it is contended that if in fact his surveyed boundaries did not enclose all which belonged to Keauhou by its ancient boundaries, the remnant would belong to the Government as unawarded land. It is correct, in our opinion, that the question for determination is what are the boundaries of Paa-kea as held in ancient times. But the taking of the limited award for Keauhou has an important bearing on the case, in view of the circumstances attending it. The land of Paa-kea, whatever its extent might be, was the property of the Princess Victoria Kama-malu, whose guardian was the late Governor Kekuanaoa, her father. The testimony of the witnesses on both parts is that between Kekuanaoa and Haumea there was a dispute as to the possession and ownership of the land now in controversy. Haumea was a chief of low degree belonging to the Island of Hawaii. The witnesses generally describe the attitude of Haumea as maintaining a claim, but relinquishing it upon the urgency of Kekuanaoa, giving it up, some say, on account of regard for Kama-malu. The testimony is that Kekuanaoa claimed it as being Paa-kea, and Haumea as being Keauhou. We have no reason to think that Kekuanaoa claimed land which was clearly and undis-

putably known to be Keauhou. With all the weight and force of his strong character he could not have coerced such a surrender. Keauhou having been awarded to Haumea, he was secure in his right to whatever was included therein, if it was well known. The fact that he abandoned his claim is a pregnant circumstance to show that there was at least an uncertainty about the boundary. The character of the land, as we have had occasion to remark in some other boundary cases, may have occasioned this uncertainty. The land was not of the kind which was applied to valuable uses in ancient times, and indeed most of it is of a description of little value at the present time. The native testimony now supports both claims. It would appear probable that even in ancient times there were some boundary lines left indefinite.

Another description of evidence introduced is the recital in sundry awards of kuleanas that were in or adjacent to Keauhou or to Paakea. Whatever is the force of these recitals, there are some on both sides of the case. But we do not consider them conclusive. They are descriptions incorporated in the survey, made by surveyors, *ex parte*, and without necessarily implying investigation. The surveys being then incorporated in the awards, do not import that the Board of Land Commissioners determined that these collateral descriptions were correct, and that the land named as adjacent was in fact such land.

The evidence goes to show that Kekuanaoa remained in possession of the disputed territory and during a series of years enjoyed the usufruct of the land, which was chiefly loose stone taken and sold for ships' ballast.

The facts that at one time the female prisoners were kept at this location, and that in 1853 there was a Government smallpox hospital on the land, do not controvert the claim of private ownership. Kekuanaoa was the Governor of Oahu, and in many respects he governed after old-time methods. It would not have been inconsistent with him to have kept the women on premises of his own, or his ward's, or to have furnished a site for a pest-house on a remote, little valued piece of her private property. There was an emergency and this location was suitable. In like manner in the year 1881 a smallpox hospital was erected on this site by the permission of the late Ruth Keelikolani, then holding

this estate. Neither does it seem to us conclusive against this being held as private property that the buildings had been removed from an adjacent location upon the objection of the owner, and presumably were moved to a location belonging to the Government. They were removed to a location belonging to or controlled by the Governor, who as a large landowner could grant such a privilege.

Upon consideration of all the testimony, which is voluminous, and of the carefully prepared decision of the Boundary Commissioner, we are of opinion that the decision should be reversed and that the boundary of Paakea be as claimed by the petitioners and set forth in their map and survey.

F. M. Hatch, for the petitioners.

W. A. Whiting, contra.

Honolulu, May 30, 1884.

J. H. WOOD *vs.* J. W. HINGLEY.

APPEAL FROM JUDGMENT ON AWARD.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

An award under a submission of "all matters in dispute of every name and nature between us now existing," will not be set aside on the ground that an item has been omitted, unless it is shown that the matter was brought to the notice of the arbitrators and they refused or neglected to pass upon it.

OPINION OF THE COURT, BY JUDD, C. J.

THE parties in this case agreed in their submission to submit to the arbitrators named, "all matters in dispute of every name and nature between us now existing." The submission was entered as a Rule of Court.

The arbitrators met, heard proofs presented by the parties, and made their award. On the motion of Hingley for judgment, the

counsel for Wood objected on the ground that an item of credit of Hingley to Wood for \$186 07, as shown by Hingley's books, was not passed upon.

The affidavits of the arbitrators show that they passed upon and considered every item or matter to which their attention was drawn by either of the parties; that the matters submitted consisted only of the written bills of the parties against each other, which, as the arbitrators supposed, contained the statements of their mutual accounts. That no books of accounts were submitted to the arbitrators by either party for inspection or examination, except in the instance of a few isolated items in the said bills, in which their accuracy was sought to be proven by showing corresponding entries in the books of account. That no books of accounts were left to the arbitrators for general examination, except as above stated.

The position is taken by Hingley that the award embraced everything submitted to the arbitrators, and that the \$186 item in question was not submitted to their consideration. The affidavit of the arbitrators presented by Wood is conclusive that the item of \$186 "was not brought to the knowledge of the arbitrators."

We think it is clear that the arbitrators passed upon every item brought to their knowledge. They are not required to do any more than this.

There are abundant cases establishing the proposition that an award cannot be set aside on the ground that an item has been omitted, unless it be shown that the matter was brought to the notice of the arbitrators, and they refused or neglected to pass upon it.

Parties must present their proofs to the arbitrators. Neglect of this by a party is deemed to be a waiver of his right to do so.

Carseley vs. Lindsey, 14 Cal., 390; *Montifiori vs. Engels*, 3 Cal., 431; *Maynard vs. Frederick*, 7 Cush., 247; *Karthaus vs. Ferrer*, 1 Pet., 222.

In this last case the Supreme Court of the United States says: "In order to impeach an award made in pursuance of a conditional submission, on the ground that only a part of the matters in controversy have been decided, the party must distinctly show

that there were other points in difference of which express notice was given to the arbitrator, and that he neglected to determine them."

The award conforms to the submission and the statute, and we see no cause for impeaching it.

Judgment of lower Court affirmed.

W. R. Castle, for J. H. Wood.

C. W. Ashford, for J. W. Hingley.

Honolulu, May 31, 1884.

THE KING *vs.* EDWARD ERICKSON.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Defendant was convicted of an assault with intent to commit rape upon a girl of 11½ years; held that it is not a conclusive presumption of law that a girl over ten consented to the assault unless there is proof of resistance, outcries and immediate complaint.

Conviction affirmed.

OPINION OF THE COURT, BY AUSTIN, J.

THE defendant was convicted on February 1, 1884, before Chief Justice Judd at the Fourth Judicial Circuit, of an attempt to commit a rape, and presents his bill of exceptions here to obtain a new trial.

The only exception argued before us is that the counsel for the defense asked the Court to instruct the jury: "That to convict it must be shown that the prosecutrix made known the assault immediately after it was charged to have been made"; also "that it must be shown that the prosecutrix made outcries if others were in hearing"; also "that by law a female over ten years of age is presumed to consent to an assault, unless there is proof of resistance, outcries and immediate complaint;" which instructions were refused by the Court, and the defendant's counsel excepted.

The prosecutrix was 11½ years old. She swore that when the defendant made the repeated attempts to commit the crime of which he was convicted, she made no outcry when others might have heard her, because the defendant kept his hand over her mouth.

The act was done on Sunday, and she did not make it known until Tuesday ; but she was told not to tell.

By the English Statute of 24 and 25 Victoria, to carnally know a girl between 10 and 12 years old is a misdemeanor, and under 10 a felony. Under the English Statute the offense shown here would have been punishable by two years imprisonment, even though not against the girl's will.

See Russell on Crimes, Vol. 1, p. 929, last edition.

But by our law the act must be against her will if above 10 years of age. Her delay in making known the outrage was a question of fact to be considered by the jury. She may have been afraid to tell because told not to, or ashamed to tell. Her tender age is a strong element, characterizing all her acts. The jury thought the delay not strange.

With the hand of her beastly assailant upon her mouth, she may have been unable or afraid to make an outcry ; and if silent from fear, or confusion or other cause, the act might be against her will.

All the facts were for the jury, and they thought the child's story was substantially true.

The counsel for defendant claims that there is a conclusive presumption of consent in case of such an assault on a girl over 10, unless there are resistance, outcries and immediate complaint. We do not understand this to be the law. All the facts were properly submitted to the jury and the evidence amply sustains the verdict.

See Wharton's Criminal Law, Vol. 2 (7 ed.), Sections 1149 and 1156 c.; 4 Bl. Com. 213.

Exceptions overruled.

Attorney-General Neumann, for Crown.

S. B. Dole, for prisoner.

Honolulu, June 16, 1884.

MARY MITCHELL vs. LOUIS MITCHELL.

DIVORCE APPEAL.

APRIL TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The technical law of default does not apply to a divorce suit; if the defendant has a defense, it is the duty of the Court to hear it.

OPINION OF THE COURT, BY AUSTIN, J.

The question in this case was reserved by the Chief Justice for the Court in Banco.

It is whether, in a libel for divorce on the ground of adultery, where no answer has been filed, the defendant at the trial may appear and give evidence, as a defense, of the adultery of the libellant committed before and after the adultery of the respondent, as alleged in the libel.

By subdivision 4 of Section 6, Chapter 16, of the laws of 1870, still in force, no divorce for the cause of adultery shall be granted where there is reasonable cause to believe that the libellant has been guilty of any act which would have entitled the defendant, if innocent, to a divorce.

The language used by the Court in the case of *Kalua vs. Kamaua*, 4 Hawaiian Reports, 58, is conclusive on the subject in this case.

The language is: "Nor can it be of possible consequence that the defendant has not pleaded the offense of the plaintiff as a bar to the action, for when such a defense comes to the knowledge of the Court, it is effectual, because nothing is lost between the parties and the public for want of pleading."

The words of the statute which impose a positive duty on the Court of refusal of a decree in such a case, override the technical law elsewhere laid down relative to a default.

Of course, in allowing such a defense, the plaintiff's rights should be protected, and a clear statement should be required of the facts expected to be proved, and if requisite, in order to

meet them, delay should be allowed; but it is the duty of the Court, on hearing that any such defense exists, to see that it is made.

If this were a case of a formal motion by defendant to file a specific answer, it may be the matter of laches should be applied to it; but that question is of little moment, for the defense must inevitably come in, plea or no plea.

Let the defense be allowed, as claimed, on such terms as the Court may deem just.

S. B. Dole, for libellant.

Honolulu, May 30, 1884.

SEGREGATION OF LEPERS.

OPINION OF THE JUSTICES OF THE SUPREME COURT TO THE LEGISLATIVE ASSEMBLY OF 1884, UPON THE LAW TO PREVENT THE SPREAD OF LEPROSY.

MAY, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The law authorizing the segregation of lepers is Constitutional.

To the Honorable President of the Legislative Assembly:

SIR: The Justices of the Supreme Court have received from the Legislative Assembly a resolution upon which their opinion was requested, and now transmit, through you, their answer to the same. The resolution is as follows:

“WHEREAS, There is a large number of men, women and children confined at Kalawao and Kakaako for having the leprosy, and as the fact of a person having said disease is not a crime, under the laws or Constitution; therefore, be it

Resolved, That this Honorable Legislative Assembly request the Judges of the Supreme Court to state their legal opinion on the following questions:

First: Is it a crime to be afflicted with leprosy, that these people are confined at Kalawao and Kakaako?

Second: Is not such confinement contrary to the Constitution?

Third: Is not the existing law relating to leprosy contrary to the Constitution?"

The first question submitted is, whether leprosy, the cause for which these people are detained at Molokai, is a crime? The preamble to the resolution concedes that leprosy is not a crime, and certainly it is not. It is a disease. There may be instances where a person having the disease of leprosy willfully contaminates others, or transmits it to his offspring, or, being free from it, recklessly exposes himself to infection, and these may be called wrong or criminal acts; but unless these acts are prohibited by law, they are not offenses, or punishable as such by law.

The second and third questions may be taken and answered together; for if the law authorizing the restraint of the lepers be in violation of the Constitution, then the restraint is itself illegal.

The fact that since the enactment of the law segregating the lepers, some nineteen years ago, its constitutionality has not been tested by an application for a writ of habeas corpus, or otherwise, may be taken as a general acquiescence by the community in the wisdom of the law. If such a course had been taken, the Supreme Court would then have had the advantage of argument from learned counsel on both sides of the question, and the decision then made would have been much more satisfactory.

It is presumed by us that the provisions of the Constitution which the mover of the resolution conceives to be violated by the Leprosy Act, are Articles 6, 9, 11, 12 and 14. They read as follows:

"Article 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

"Article 9. No person shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

"Article 11. Involuntary servitude, except for crime, is for-

ever prohibited in this Kingdom. Whenever a slave shall enter Hawaiian territory he shall be free.

"Article 12. Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects, and no warrants shall issue but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the persons or things to be seized.

"Article 14. Each member of society has a right to be protected by it in the enjoyment of his life, liberty or property, according to law."

The preamble of the Act to prevent the spread of leprosy is as follows :

"WHEREAS, The disease of leprosy has spread to a considerable extent among the people, and the spread thereof has excited well-grounded alarms; *and whereas further*, some doubts have been expressed regarding the powers of the Board of Health in the premises, notwithstanding the 302d Section of the Civil Code; *and, whereas*, in the opinion of this Assembly, the 302d Section is properly applicable to the treatment of persons afflicted with the leprosy; yet, for the greater certainty and for the more sure protection of the people, be it enacted," etc.

The Section 302d of the Civil Code referred to is as follows :

"When any person shall be infected with the smallpox, or other sickness dangerous to the public health, the Board of Health, or its agent, may, for the safety of the inhabitants, remove such sick or infected person to a separate house, and provide for him with nurses and other necessities, which shall be at the charge of the person himself, his parents or master, if able; otherwise, at the charge of the Government."

In a case decided in 1872 by the Supreme Court of the United States (reported in 16 Wallace, 86), Judge Field says of the law the Court was then considering, which concerned the slaughter houses of New Orleans, that its enactment was considered as the legitimate exercise of what is termed the *Police power of the State*: "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety, and is exercised on a great variety of subjects and in almost numberless ways. All sorts of restrictions and burdens are imposed under

It; and when these are not in conflict with any constitutional provisions or fundamental principles, they cannot be successfully assailed in a judicial tribunal." In the same case, Judge Miller says: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the social order, *the life and health of the citizens*, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property."

The Supreme Court of Vermont, in 27 Vermont Reports 149, says: "The police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

In 2 Kent's Commentaries, 340, the author says: "Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law, in the midst of dense masses and population, on the general and rational principle that every person ought to so use his private property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

Judge Shaw, in a case reported in 7 Cushing 85, says: "The police power is a power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge for the good and welfare of the commonwealth, and of the subjects of the same."

The like authority is conferred on the Legislature by the Hawaiian Constitution, in Article 48. "The Legislature has full authority from time to time to make all manner of wholesome laws not repugnant to the provisions of the Constitution."

It has been truly said that self-preservation is the first law of nature. This is equally true of a State. "*Salus populi suprema est lex.*" The State has the authority inherent in itself to enact laws to secure the health, welfare and safety of the individual, and we have seen above that this authority is expressly conferred by the Constitution.

In Dwarris on Statutes, the police power of the State is called "the law of *overruling necessity*..". No State could exist without it. If it did not exist in this Kingdom, our population would be liable to be swept away by any and every contagious disease that might come to our shores, and no measures of quarantine or restriction could be taken against it.

The Legislature, by the Act of 1865, in the exercise of its constitutional authority to make wholesome laws, were of the opinion that, in order to secure the health and welfare of the community, all leprous persons, who shall be deemed by competent authority to be capable of spreading the disease, should be isolated and secluded.

It will be seen from a perusal of the whole Act concerning leprosy that the Legislature regarded this disease as contagious, or capable of being communicated to other human beings. From the best information the Court can obtain, this is a characteristic of this disease. Upon this view of the disease, laws segregating lepers have been enacted in nearly all countries of the world.

The Legislature of Hawaii acted upon this police power of the State when it enacted all the health laws of this Kingdom, and these have existed since the foundation of the Government.

The Supreme Court, in the Chinese Laundry Case, 4 Hawn. Rep. 835, decided that an Act forbidding the carrying on of the business of laundry keeping, or washing for hire, within certain limits in Honolulu, was an exercise of the police power of the State with regard to the comfort, safety and welfare of society, and was constitutional.

As at present advised, we are of the opinion that the law authorizing the segregating and isolating of lepers is not only a wholesome law and constitutional, but that without such a law the result would eventually be that much of our useful population would leave these islands, ships would cease to touch here, our

products would fail to find a market abroad, and these fair islands would become a pest-house to be avoided by the whole civilized world.

A. FRANCIS JUDD,
LAWRENCE McCULLY,
BENJ. H. AUSTIN.

Honolulu, May 20, 1884.

ALIENS AND DENIZENS.

OPINION OF THE JUSTICES OF THE SUPREME COURT TO THE
LEGISLATIVE ASSEMBLY OF 1884, AS TO THE ALLE-
GIANCE OF ALIENS AND DENIZENS.

MAY, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

An alien cannot hold an office of profit and emolument under the Government without taking the oath of allegiance.

An alien, to whom Letters Patent of Denization have been granted, has the status of a subject, and he need not take the oath of allegiance as a requisite to holding a Government office.

To the Honorable President of the Legislative Assembly :

SIR : On the 15th May the Secretary of the Legislative Assembly transmitted to the Judges of the Supreme Court, for their opinion thereon, copies of two resolutions passed by your body. They are as follows :

1st. " WHEREAS, There are employed as Secretary in the Foreign Office and Board of Health two Secretaries, Mr. Webb and Mr. Parker, who have not taken the oath of allegiance, and who are drawing pay from the public treasury ; therefore be it

Resolved, That the Justices of the Supreme Court be requested to state their opinion whether the appointment and the drawing of pay by the two persons named is in accordance with the laws as they now exist."

2d. "*Resolved*, That the Justices of the Supreme Court be requested to express their opinion on the following question :

"Is it lawful for an alien, to whom letters patent of denization have been conferred, to be appointed to an office of profit or emolument under the Government of this Kingdom, without taking and subscribing the oath of allegiance in manner and form prescribed by Sections 430 and 431 of the Civil Code ?"

The question raised by the first resolution is whether an alien can legally fill the position of Secretary to the Minister of Foreign Affairs or of Secretary to the Board of Health.

Under the Statute of 1846, aliens were not eligible to any civil or military office in this Kingdom, created by the laws. Vol. 1, Laws of 1846, p. 76.

This Act was repealed on the passage of the Civil Code in 1859, and, until 1876, aliens were eligible to office in this Kingdom, except in the particular cases where the law limited the appointment to citizens, as, for instance, Ministers to the King, or Governors, who must by Sec. 30 of the Civil Code be either "subjects or denizens."

An Act was passed in 1874 (Chap. XLII of the Session Laws of that year), entitled "An Act to provide for the taking of the oath of allegiance by persons in the employ of the Hawaiian Government."

The preamble is as follows :

"WHEREAS, It is expedient that all persons who may be appointed to places of profit or emolument under the Hawaiian Government should take the oath of allegiance, be it enacted by the King and the Legislative Assembly of the Hawaiian Islands, in the Legislature of the Kingdom assembled :

"SECTION 1. From and after the passage of this Act, every person who may be appointed to any office of profit or emolument under the Government of this Kingdom shall, before entering upon the duties of his office, take and subscribe the oath of allegiance in manner and form prescribed by Sections 430 and 431 of the Civil Code."

The second section prescribes that on the failure of an office holder to take the oath within three months after the passage of this Act, he shall be deemed to have resigned, and his office shall become vacant.

This Act applied to all officeholders, native-born citizens as well as aliens, and this may have given rise to the opinion, which we understand is entertained by some, that the oath of allegiance here required is an oath of office and not of naturalization.

Section 429 of the Civil Code authorized the Minister of the Interior, on the application of an alien foreigner, on the existence of certain requisites, to administer the oath of allegiance to him.

Section 430 reads as follows: "The oath of allegiance to be administered as aforesaid shall be as follows:

"The undersigned, a native of.....lately residing in.....being duly sworn upon his oath, declares that he will support the Constitution and Laws of the Hawaiian Islands, and bear true allegiance to His Majestythe King.

"Subscribed and sworn to," etc.

Section 431 merely prescribes that the oath shall be subscribed by the person *so naturalized*, and sworn to in the form most obligatory upon his conscience, and the jurat thereof is to be subscribed by the Minister of the Interior or his Chief Clerk.

The latter clause of the next section, 432, says that "every foreigner *so naturalized* shall be entitled to all the rights, privileges and immunities of a Hawaiian subject."

It is therefore evident that the above-recited oath cannot be considered as an oath of office, but it is the oath of allegiance, the taking of which naturalizes the alien and admits him to Hawaiian citizenship.

It is too clear to admit of discussion that a native-born citizen is not required to take an oath of allegiance. The Legislature of 1876, by Chapter VIII of the Acts of that year, probably to cure the defect in the Act of 1874, amended the law, so that it now reads: "From and after the passage of this Act, *every person of foreign birth* who may be appointed to any office of profit or emolument under the Government of this Kingdom, shall, before entering upon the duties of his office, take and subscribe the oath of allegiance in manner and form prescribed by Sections 430 and 431 of the Civil Code." This law is now in force.

It will be seen that the Act does not say that *no alien* shall be

appointed to any office of profit under the Government, or that aliens are ineligible to office, but it commands, as a condition precedent to his entering upon the duties of any office of profit or emolument under the Government, that he take the oath of allegiance, which, as we have seen above, means that he be naturalized.

It is not to be presumed that a person would be allowed to draw the pay of an office unless he undertook to perform its duties.

We have no doubt that the law requires all persons of foreign birth, in order to enable them to hold offices of profit or emolument under the Hawaiian Government, to be naturalized, except in the instances hereinafter mentioned.

It may be urged that the law is not mandatory, but merely directory.

This Court has had occasion to consider a similar question on the application of Mr. Ashford to be admitted to practice law. (4 Haw., 614). The law authorized the Court to admit as practitioners such persons, "*being Hawaiian subjects of good moral character, as the Court may find qualified for that purpose.*" We held that the law was imperative and mandatory to admit to practice none but Hawaiian subjects. "The provisions of a statute are to be regarded as directory merely when they are considered as giving directions which ought to be followed, but not as limiting the power in respect to which the directions are given, so that they cannot be effectually exercised without observing them."

Cooley's Const. Limitations, 74.

In the case of *The People vs. Schermerhorn*, 19 Barb., 558, it was held that "statutory requisitions are deemed directory only when they relate to some immaterial matter where a compliance is a matter of convenience rather than of substance."

To illustrate what a directory statute is: "It has been held that where a statute specifies the time within which a public officer is to perform an act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed or the language of the statute shows that the designation of the time was intended as a limitation of power."

People vs. Allen, 6 Wendell, 487; *Jackson vs. Young*, 5 Cowen, 269.

Lord Mansfield's rule is that whether the statute is mandatory or not depends upon whether the thing directed to be done is the *essence* of the thing required. Burrows, 447.

The law now under discussion plainly requires, in our opinion, that the appointee to an office of profit under this Government shall not be an alien.

Whether any given employment under Government is or is not an "office of profit or emolument" would depend upon circumstances. The office of Secretary of the Board of Health is created by law. See Chapter XI of the Laws of 1876, where the Board of Health "is authorized to employ a Secretary, medical practitioners and agents, who shall receive such compensation for their services as shall be approved by a majority of the Board at a regularly convened business meeting thereof, said compensation to be paid out of any funds available to the Board by legislative appropriation."

We consider the position of Secretary to the Board of Health to be an office of profit or emolument under the Government and that it comes within the purview of the Act of 1876, Chapter VIII.

As regards the Secretary to the Minister of Foreign Affairs, we fail to find any statute creating the office or referring to it in any manner. But the Legislature, in voting a salary for such an officer, has considered such an official necessary, and has recognized it as an "office." We have no doubt that this office also is one of profit or emolument under the Hawaiian Government, and that Chap. VIII. of the Act of 1876, above discussed, applies to the appointee to this office.

But it may be said that the Act of 1882 (Chap. XVIII.), amending Sections 428 and 429 of the Civil Code, has so enlarged the requisites for naturalization as to make naturalization in many cases impossible. This Act requires of the person wishing to be naturalized, (1) the approval of the King, (2) that he shall have resided within the Kingdom five years or more next preceding his application, (3) that he own taxable real estate within this Kingdom free from encumbrance, (4) that he be not of immoral character, (5) that he be not a refugee from the justice of some other country, (6) that he be not a deserting sailor, marine, soldier or officer, and (7) that the Minister of the Interior be satisfied

that the applicant's admission to naturalization will be for the good of the country.

That the law is illiberal, considering that this Kingdom desires population, and invites and encourages immigration, is manifest. But it is a sufficient answer to say that it is the law of this country at present.

This leads us to the discussion of the second resolution, whether it is lawful to appoint an alien, upon whom letters patent of denization have been conferred, to an office of profit or emolument under the Government of this Kingdom, without taking the oath of allegiance.

Section 433 of the Civil Code is the entire authority for the conferring of letters patent of denization. It reads as follows :

"It shall be competent for His Majesty to confer upon any alien resident abroad, or temporarily resident in this Kingdom, letters patent of denization, conferring upon such alien, without abjuration of allegiance, all the rights, privileges and immunities of a native. Said letters patent shall render the denizen in all respects accountable to the laws of this Kingdom, and impose upon him the like fealty to the King as if he had been naturalized as hereinbefore provided."

It will be seen that a denizen is by the letters patent expressly endowed with "all the rights, privileges and immunities" of a *native*, and this is precisely the language used as to the effect of naturalization. Letters of denization have always been considered to be a substitute for the oath of allegiance by which, as a special favor, the privileges of Hawaiian citizenship are granted without prejudice to the status of the denizen as a citizen or subject of a foreign state. If they do not have this effect, and therefore dispense with the necessity of taking the oath of allegiance, it is difficult to see why they should be asked for or accepted.

As we have above seen, one of these rights or privileges is that of appointment to public office without the necessity of taking the oath of allegiance.

We are of the opinion that letters patent of denization from the King, conferring upon an alien, without abjuration of allegiance, all the rights, privileges and immunities of a native, place the recipient in the status of a subject, and it is therefore

not requisite that he take the oath of allegiance as a condition of his holding an office of profit or emolument under this Government. Such was the view of the authorities of this Kingdom from early times. For the honored W. L. Lee, the first Chief Justice of this Court, was a denizen. His letters patent, dated 1st of December, 1846, are in the archives of the Court. Respectfully submitted.

A. FRANCIS JUDD,
LAWRENCE MCCULLY,
BENJ. H. AUSTIN.

Honolulu, May, 1884.

THE KING *vs.* KEANU.

EXCEPTIONS FROM DECISION OF THE CHIEF JUSTICE,
OVERRULING MOTION FOR NEW TRIAL.

JULY TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

There being evidence to support a verdict, the Court will not set the verdict aside.

Affidavit of a juror as to a remark made in the jury room is inadmissible.

The King *vs.* Kahalewai, 3 Hawn., 465, followed.

OPINION OF THE COURT, BY MCCULLY, J.

THE defendant was convicted of murder in the early part of the present term. Motion for a new trial was denied by the Chief Justice, and exceptions to this brought before the Court in banc.

The first ground on which the defendant asks for new trial is the general one of the verdict being contrary to the law and evidence, meaning by that, no sufficient evidence to show that the defendant proceeded by either of the roads of the locality from his house to the site of the murder, and that he could not have gone the distance, overtaken the deceased, murdered him, and returned to where the evidence brings him, within the time

alleged. That there was no sufficient proof that the defendant sustained illicit relations with the deceased's wife to afford the motive alleged by the prosecution for taking the life of the deceased. That the prosecution failed to prove that certain stains found on the jumper worn by the defendant were of human blood. That the only direct witness of the crime, the wife of the murdered man, who was with him when he was killed, is not credible; from the conflicting stories she has told.

If the conviction in this case depended on the proof that the stain on the defendant's garment was human blood, we should hold that it was not supported. But it does not depend on it, and the Attorney-General claims only that the circumstances of the treatment of that garment were consistent with other facts in the case. Upon the other and important and essential facts adduced by the prosecution, there was a great amount of testimony given. The jury found them to be true, and the Court sees no reason to set aside the verdict as not being well supported as to all the facts on which it rested.

Besides the contention made for the defendant regarding the sufficiency of the testimony, they offer the affidavit of a juror as to a certain remark made by another juror in the jury room. This is inadmissible. In the case of *The King vs. Kahalewui*, 3 Hawn., 465, the law is set forth with ample citation of authorities, and this case clearly comes within the rule there enforced. The principles governing new trials, as raised in this case, are simple and well established, and they must control our decision, however serious the consequences may be to the defendant.

We sustain the decision, overruling the motion for new trial.

Paul Neumann, Attorney-General.

J. L. Kaulukou and *J. M. Poepeo*, for defendant.

Honolulu, July 31, 1884.

C. GERTZ vs. ANNA M. GERTZ.

ANNA M. GERTZ vs. C. GERTZ.

TAXATION OF COSTS.

JULY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Statutory attorney's fees will not be taxed in a suit for divorce or separation.

OPINION OF THE COURT, BY JUDD, C. J.

THE attorney for Anna M. Gertz excepts to a refusal of the Chief Justice to tax his statutory fees. The cases were, first, a suit by Mrs. Gertz against her husband for a separation, in which the Court denied her petition, and, second, a libel for divorce by Mr. Gertz against his wife, which was dismissed by the Court.

Upon no theory can the items claimed be taxed against the husband in the wife's suit for separation, for this suit failed.

It has not been the practice of this Court to tax in matrimonial litigation the statutory attorney's fees, but the Court makes an allowance to the wife's counsel, if asked for and the circumstances warrant it, and this has been considered to occupy the place of taxed costs.

This practice of the Court being now questioned on this appeal, it seems to us to be proper and fitting that the suit money ordered to be paid by the husband should take the place of statutory fees. This is the practice in some States of the American Union.

See *Whipp vs. Whipp*, 54 N. H., 282.

The rule of Court referred to, "that costs shall follow the judgment in all original actions," certainly does not apply to suits appertaining to the matrimonial relation, for in these the husband, as the only party responsible, has to pay costs whether losing or winning his case.

We consider that the authority of the Court over the allowances

for the wife's expenses of the suit excepts such cases from the operation of the general rule.

Exceptions overruled.

C. W. Ashford, for exceptions.

Honolulu, August 4, 1884.

W. C. ACHI *et al.* vs. PONI *et al.*

APPEAL FROM COMMISSIONERS OF PRIVATE WAYS AND WATER RIGHTS.

JULY TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

A grantor of land is entitled to a right of way by necessity, over the land sold, to his remaining land.

The Commissioners of Private Ways and Water Rights are authorized to make such decision as may in each particular case appear to them to be just and equitable, but not contrary to general principles of law.

OPINION OF THE COURT BY JUDD, C. J.

THIS is an appeal from the Commissioners of Private Ways and Water Rights for the District of Honolulu.

It appears that the plaintiffs are owners, by a deed dated February 2, 1884, of a parcel of land bordering upon the Nuuanu stream west of Maunakea street and between Beretania and King streets. There are two narrow lanes leading from Maunakea street in toward the river. The lot in question is between these two lanes, but is cut off from both of them by intervening lots.

This neighborhood is quite thickly populated by natives and Chinese. The lots are small and of irregular shapes and exceedingly inconvenient of access.

The nearest lane to the lot owned by plaintiffs, leading out to Maunakea street, is called "Kaalone's" or "Williams' Lane." This lane passes by the lots owned by the defendants Poni and Ami and goes no farther.

The Commissioners decided that the plaintiff should have a right of way six feet wide, cutting off three feet from each of the lots where they adjoin each other.

It appears that, for some time previous to the time when the plaintiffs bought, the access to this lot was at another corner, by permission of the landowners over which the way passed, and that this is now closed up, so that there is now no way open by which plaintiffs' premises can be reached except by a boat by way of the river, which is impracticable. The plaintiffs ask the right of way from necessity. It seems that the lots owned by plaintiffs and the two defendants were originally parts of the same title, Royal Patent 5657, and that J. Kakina sold the whole piece of land bordering on the lane to Poni, himself having egress to the street by permission of other landowners by an opening now closed.

Kakina did not reserve in the deed a right of way to his land.

Poni sold a piece of this lot to Ami. It is claimed that when J. Kakina sold to Poni the law presumed that he reserved a right of way by which he could approach his own land, and that his grantees are entitled to the same privilege.

In 3 Kent's Com., *422, the author says: "If a man hath several distinct parcels of enclosed land, and he sells all but one surrounded by the others, and to which he has no way or passage except over one of the lots he has sold, it has been made a question whether he be entitled to a right of way against his own deed, when he has been so improvident as to reserve none. It is said in *Clark vs. Cogge* (Cro. Jac. 170), that the law reserves to him a right of way from necessity. The law presumes a right of way reserved, or rather gives a new way from the necessity of the case, and the new right of way ceases with the necessity for it. This principle of law has been for a long time recognized,"

"In *Buckby vs. Coles* (5 Taunt. 311), it was decided that if a person owned close A, and a passage of necessity to it over close B, and he purchased close B and thereby united in himself the title to both closes, yet if he afterward sold close B to one person without any reservation, and then close A to another person, the purchaser of close A has a right of way over close B. This case, (says Kent) seems to put an end to all doubts as to the existence

of a right of way from necessity even over the land which the claimant of the way previously sold.'"

Kent says further "that the right of the grantor to a right of way over the land he has sold to his remaining land must be founded upon an implied restriction incident to the grant, and that it cannot be supposed the grantor meant to deprive himself of all use of remaining lands."

We think this principle is sound and eminently just. And there is no reason why it should not be held to apply in favor of the plaintiffs, who are assignees of Poni's grantor, J. Kakina. When Kakina sold to Poni, Poni's whole lot was then charged with the right of way, in order to afford access to what remained of Kakina's land. Poni sells to Ami and makes no reservation of the right of way in the deed. It must be presumed that the right to a way to the Kakina lot was still existing, and it must be over the land remaining in Poni, for he stands to this extent in Kakina's shoes.

On principle, therefore, this right of way must pass over Poni's land. Undoubtedly the Commissioners thought that the loss sustained by the right of way should be equally borne by Poni and Ami.

The commissioners are authorized by statute to make such decision as may in each particular case appear to them just and equitable, but not contrary to well-settled principles of law.

This court has the same jurisdiction on appeal.

Poni's house was nearly the whole length of his lot, but there is a space on the side toward Maunakea street upon which there are no substantial buildings. Here we think the plaintiffs' right of way should be located, and accordingly adjudge that plaintiffs have a right of way from their land to Williams' lane over the land of Poni, the way to be located across the end of the lot nearest to Maunakea street, and to be in width the space between the present fence and Poni's house as it now stands. The plaintiffs to build a suitable fence adjoining Poni's house, but not touching it.

W. R. Castle, for plaintiffs.

J. L. Kaulukou, for defendants.

Honolulu, August 12, 1884.

NAKANELUA *vs.* KAILIANU.

TAXATION OF COSTS.

JULY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Defendant having, on his appeal, reduced the amount recovered by plaintiff one-fifth: Held, under Sec. 1013, Civil Code, that plaintiff must pay costs.

OPINION OF THE COURT, BY McCULLY, J.

FROM the May Term of the Third Judicial Circuit Court. The case came to the Circuit Court by appeal from the Circuit Judge in Chambers, where the plaintiff had recovered \$25 for the value of a pig which the defendant had slaughtered, claiming it to be his own. The defendant appealed. The jury in the Circuit Court found for the plaintiff as before, but reduced the value of the pig to \$20. The defendant then claimed that the costs of the Court fell upon the plaintiff by force of the following statute provisions, Civil Code, Sec. 1013:

"Costs shall be allowed to the prevailing party in judgments rendered on appeal in all cases, with the following exceptions and limitations:

"1. If the defendant against whom judgment is rendered appeal, and judgment be rendered in his favor in the Appellate Court, and the amount recovered in the Court below be reduced one-fifth or more, costs shall be awarded to the appellant."

The plaintiff contends that the judgment is in his favor. It is found that he was the owner of the pig, though the value of it is assessed at \$20, instead of \$25. The substantial issue between the parties has been property, not valuation. The defendant appealed upon the question of ownership, claiming that the pig, whatever its value, belonged to him, and the verdict is not in his favor, but in favor of the plaintiff, although for a reduced valuation.

The defendant claims that by the appeal the value of the pig was put in issue equally with the fact of ownership, and that the

statute provisions must intend to give the defendant the benefit of costs whenever by an appeal he has reduced the amount of the judgment as much as one-fifth, and that the statute has no meaning and is futile unless that construction is put upon it.

It is clear that the verdict in this case is in the plaintiff's "favor in the Appellate Court." Looking no further than this, it is clear that he is entitled to costs under the general provision. But the words which follow, viz.: "And the amount recovered below be reduced one-fifth or more," must be taken to qualify what precedes them in the clause. They import a verdict or judgment still remaining in favor of the plaintiff, but "reduced" in amount by one-fifth. We do not think the expression of the statute is felicitous in terming a reduced judgment in the plaintiff's favor a judgment for the defendant, but it must be construed to mean that or nothing. We must presume that the Legislature intended a meaning. The intention here would seem to be to provide that when a defendant, who has suffered a judgment, appeals, and is justified by the Appellate Court to the extent of one-fifth reduction, he shall be saved costs.

The operation of this statute sometimes produces an anomalous kind of justice. Thus, in the present case, by the reduction of the valuation from \$25 to \$20, the plaintiff, recovering the \$20, pays a larger sum, including the costs of defendant's witnesses and costs of the two trials below. He makes a loss by the verdict in his favor, only diminished from what he would have suffered by a verdict against him by the sum of twenty dollars, while the defendant, who is now shown not to have been the owner of the property in dispute, goes out of Court without loss.

But with our view, as above, of the law, this injustice cannot be avoided.

Plaintiff is ordered to pay costs.

W. L. Holokahiki, for plaintiff.

W. A. Kinney, for defendant.

Honolulu, August 12, 1884.

KAMALU vs. JOSEPH LOVELL.

TAXATION OF COSTS.

JULY TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Final liability to pay costs is not determined till final judgment. If a new trial is ordered, the party finally losing the case must pay all the costs, notwithstanding he prevailed in the first trial.

OPINION OF THE COURT, BY JUDD, C. J.

THE result of the first jury trial of this case, held April, 1882, was a verdict for plaintiff. The costs were \$33 45. In September a new trial was ordered by the Supreme Court in banco ; costs of appeal \$7.

The new trial was had in October, with a verdict again for the plaintiff ; the costs were \$43 10. In 1883 a new trial was again ordered by the Court in banco ; appeal costs \$12.

In April the third trial took place, when a verdict for the defendant was ordered by the Court ; costs \$41 40.

In January, 1884, the plaintiff's exceptions were overruled by the Court in banco ; costs of appeal \$8 50. These costs include jurors' fees for attendance and verdicts, but not the taxable attorneys' fees.

The plaintiff's counsel urges that, as he prevailed in the first two trials before the jury, he is not required to pay the costs of these trials. He contends that he is only liable to pay the costs of his unsuccessful appeals to the Court in banco and of the last jury trial.

And the question for us to decide is, whether the plaintiff, who obtains a verdict in his favor at the first trial of his case, is liable to pay the costs of this trial, if the final judgment be against him.

It seems to us that he is. That the defendant should not be compelled to pay them is clear, for the ordering of a new trial means that the verdict against defendant was wrong.

Sec. 1013 of the Civil Code prescribes that "costs shall be al-

lowed to the prevailing party in judgments rendered on appeal in all cases," with certain exceptions which do not apply to this case.

Sec. 1014 prescribes that "whenever costs are awarded to the appellant, he shall be allowed to tax as part thereof the costs and fees paid in the lower Court in taking the appeal, in addition to the costs of the Court appealed to."

Rule of Court XIV is that "costs shall follow judgment in all original actions in this Court."

We consider that the final liability to pay costs is not determined until the final judgment. There must be excepted, of course, the cases where costs are ordered by the Court to be paid as penalties, or as terms of a continuance, etc. There is no reason why costs should be lost—that is, paid by no one.

The errors of juries or of courts in deciding matters of fact or law do not impose upon them the liability to pay costs. These must fall on the litigating parties, and be borne by the one eventually losing.

The plaintiff must pay costs.

S. B. Dole, for plaintiff.

W. R. Castle, for defendant.

Honolulu, August 12, 1884.

D. W. LUHA *vs.* WM. and ELIZA W. HOLT.

APPEAL FROM INTERMEDIARY COURT OF OAHU.

JULY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A widow, in possession of her husband's land by consent of his heirs, agreed that plaintiff should plant part of the land on shares; before maturity of the crop, the land was sold to pay debts of decedent.

Held, that plaintiff was entitled to harvest the crop; but he, not having been evicted by a paramount title, cannot recover damages against the widow for breach of covenant.

OPINION BY McCULLY, J.

THE case comes by appeal from the Intermediary Court. The parties agree that the statement of the case in the decision rendered therein shall be taken as the case for consideration here, as follows: "The action was covenant. The defendants were in possession of taro land in Honolulu, by right of the wife, as widow of W. L. Austin, deceased, with the permission of the heirs. While so in possession, and before application to sell the land by the administrator of the estate of the said Austin, deceased, to pay debts, it was agreed between the plaintiff and defendants that the plaintiff should plant, raise and harvest a crop of taro on the land, and should have one-half the crop or proceeds for his share. Under this agreement the plaintiff planted a crop, and thereafter, before its maturity, the land was duly sold by the administrator to pay debts of the deceased."

"The plaintiff claims ouster, and so breach of covenant for quiet enjoyment and damages."

The widow was in lawful possession of the land, as provided by Sec. 1305, Civil Code, as follows: "When a widow is entitled to dower in land of which her husband died seized, she may continue to occupy the same with the children or other heirs of the deceased, or to receive one third part of the rents, issues and profits thereof, so long as the heirs do not object, without having her dower assigned;" and the plaintiff was a tenant in common of the growing crop with her. *Walker vs. Fitts*, 24 Pick., 193. Freeman on Co-Tenancy, Sec. 254.

The widow was a tenant in common of the estate with the heirs until partition of dower. The use to be made of a piece of taro land was in cultivating a crop of taro. This she has done by the arrangement with the plaintiff to plant and cultivate on shares. Now, the land having been sold by order of the Probate Court to liquidate debts of the deceased, what were the rights of the widow and the plaintiff in the crop of taro standing on the land?

The widow's dower has not been alienated by the proceedings, and she remains a tenant in common with the purchasers. It would follow from this that her rights in the crop have not been impaired or compromised by the sale, and it does not appear in evidence that at the sale she abandoned any legal rights.

In another view, this conclusion may be reached by the doctrine of emblements. The widow was a tenant at will of any and all of the land until her third part should be assigned. This is an estate of uncertain duration. During the uncertain time of her holding she had a right to plant an annual crop, and to reap it, although the sale of the estate, or a portion thereof, should meanwhile terminate her tenancy therein. But the right of her cotenant in the crop, the plaintiff, is the same as her own. There has therefore been no eviction by paramount title of the plaintiff's possession of the crop. "The right to emblements carries with it the right to enter upon and cultivate the land and harvest the crops when ripe."

1 Washb., R. P. 102.

The plaintiff, therefore, cannot recover from the defendants for breach of covenant of possession, for he was not compelled by a superior right to relinquish the possession of his crop. In the language of Taylor's Landlord and Tenant, Sec. 308: "The landlord is in no event under an obligation to defend the tenant, or answerable to him under this covenant, unless he has been actually evicted by some person claiming the premises under a legal title, because the law itself defends every one against wrong."

We give judgment for the defendants.

C. W. Ashford, for plaintiff.

W. A. Kinney, for defendants.

Honolulu, September 30, 1884.

CLARISSA C. ARMSTRONG AND KOA (k) vs. KAPOHAKU (w)
AND PAU (w).

APPEAL FROM DECISION OF McCULLY, J.

JULY TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Defendants, without disclosing their title, allowed plaintiff to lend money on mortgage of certain land, to which the mortgagor had apparently a good title; subsequently defendants recovered the land in an action of ejectment against the mortgagor; the money obtained from plaintiff on the mortgage was used by the mortgagor in permanent improvements on the land.

Held, affirming the decision appealed from, that plaintiff could recover the amount of the loan and interest from defendants.

DECISION OF McCULLY J. APPEALED FROM.

WITHOUT giving a formal abstract of the bill and answer, a brief narrative of the facts and circumstances which are involved in this litigation, as they appear from the pleadings and the testimony taken during five days, will sufficiently explain the points for adjudication.

May 1, 1861, a Royal Patent or grant issued to one "Koa" for 110 acres of land purchased from the Government in the district of Kohala, Hawaii.

There are two men named Koa involved in all the history of this case, one of whom may be designated as Koa deceased, the other as Koa plaintiff. The defendants are Kapohaku, the widow, and Pau sister, of Koa deceased.

At the April term, 1882, of the Supreme Court these defendants, as the heirs of Koa deceased, in an action of ejectment recovered possession of the above-granted premises, together with \$1,200 damages, as having been granted to Koa deceased.

The question there at issue was to determine which of the two men named Koa was the grantee in the Royal Patent. While it

was conceded in the present case that the judgment obtained in the ejectment suit must be taken to have established for a fact that the grantee was Koa deceased and not Koa plaintiff, evidence was introduced at large before me by both parties, showing the history of the purchase of the land, the occupation of it and the course of dealing during twenty years. At this point it should be said that the plaintiff, Mrs. C. C. Armstrong, brings her bill to recover \$500 loaned to Koa plaintiff, secured by mortgage on these premises and expended in improvements made thereon.

The plaintiff Koa with other witnesses gave evidence with detail of many special circumstances, that he made the purchase of the land and received the patent, and always held and treated the land as his own. Per contra, the evidence is complete and positive that the man who purchased the land and received the grant was Koa deceased.

Taking, as we do, that the truth is that the patentee was Koa deceased, I must believe that the story by which that was supported is the true one.

The result of the testimony given on both sides of matters following the purchase of the land is as follows:

The full name of Koa deceased was Kahoolomokuokekoa, certainly a noticeable, peculiar and distinctive name. He was generally called and known by the brief name "Koa." Koa plaintiff was a "namesake" of Koa deceased, as to the short name. He never appears to have had the full name. This full name was not unknown to the friends of Koa deceased. He himself was particular, on one occasion given in testimony, to explain to a tax assessor that Koa was only his appellation for brevity, and that his proper name was as above. Koa plaintiff was a "namesake" of Koa deceased. He was considerably his junior. They lived in the same neighborhood in Kohala, but neither of them on the land in question. The connection or relationship may have been only a Hawaiian friendship. The land was *kula*, or pasture land, and in the year after the purchase was not fenced. I think it is shown that both of these men and their families and relatives or "ohana," in the early years of the purchase, occupied by cultivation such parts or pieces of this land as they needed. A tract of 110 acres would furnish ample area for the use in this manner of several families.

Sweet potato patches of from a quarter of an acre to an acre in extent might be placed here and there and from year to year, without conflict, by individuals of a circle of people who may have lived very much as a single family.

After several years of such loose occupation, the one and the other of the two Koas came to Honolulu, not in company of each other. Here they lived for several years, with visits to Kohala. The land probably was used by their families and friends as before. In 1878 we find both Koas in Kohala. Some time in that year Koa Sr. died. Planting on the land had ceased as it was not fenced, and there were now cattle and horses running at large in that neighborhood.

About this time Koa plaintiff built a house on this land and occupied it. He had possession of the original paper grant, and holds it to the present time. In 1878 he raised money by a mortgage on this land, likewise in 1877, both of record. The mortgage to Mrs. Armstrong was the third, made January 15, 1881. In 1880 he had an acre surveyed for sale. There is evidence that the survey and the proposed sale were brought to the notice of the defendants. In 1878 he made a lease of 100 acres of this land and afterward collected the rents at \$400 per annum for four years. In 1881 he built another house and repaired the first, also put some fencing on the land. He becomes a plaintiff in this action to recover the amount expended other than the money of Mrs. Armstrong, in making these improvements, but after showing by his own testimony that this was much within the amount received by him for rent, the plaintiff's counsel withdraws the claim. The plaintiff Koa's testimony is that of the \$500 received from Mrs. Armstrong he expended \$446 in material for these houses and improvements, and the remainder went toward his own support while he was building them, he being a carpenter and expending his own labor.

The bill alleges that Koa, having been deprived of this property, is unable to pay the sum borrowed from Mrs. Armstrong, and charges that the conduct of the defendants constitutes a fraud on the said Mrs. Armstrong (the claim of Koa plaintiff now being abandoned), and prays that an account being taken of the amount of (Mrs. Armstrong's) money expended on the premises, and now

inuring to the benefit of the defendants, they may be required to pay the same to her with interest from date of the ejectment.

The position of affairs at the date of the Armstrong loan and mortgage was this: Koa plaintiff held the original grant and it was a grant to "Koa." He was in notorious possession of the land, having leased 100 acres of it three years before and having built and occupying a house on the remnant of ten acres. The evidence of defendants making a claim of right is very slight. It appears to me that when Koa plaintiff presented himself to the agent of Mrs. Armstrong for a loan, holding a royal grant to Koa, being in possession of the land, having leased the most of it, by a lease which was notorious in the locality, that there was nothing to advise such agent of the fact, as ascertained by the result of the ejectment suit subsequently, that the Koa intended in the grant was another man, and that Koa plaintiff was falsely personating a man of his own name. There had been no effectual assertion of defendants' rights, and on the other hand there was no negligence on the part of the plaintiff Armstrong. It could not have been surmised, under the circumstances, that the mortgagor was not the veritable grantee. There was nothing in any record to show that the title had ever been in any other person than the one who produced the title and was in possession.

Under that state of facts, does the rule in equity of constructive fraud apply, to charge the defendants with the money borrowed and expended on their land. The principle of equity is that if the true owner stands by and suffers improvements to be made on an estate, without notice of his title, he will not be permitted in equity to enrich himself by the loss of another, but the improvements will constitute a lien on the estate.

Story's Equity Jur., Sec. 1237. *Green vs. Biddle*, 8 Wheat, 77.

In order, however, to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them and should by his conduct or gross negligence influence the purchase, for if his acts or silence or negligence do not mislead or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part. Story's Eq. Jur., Sec. 386.

As to Koa plaintiff no claim could be made on the defendants,

for he must now be held to have been all the time cognizant of the title of Koa deceased and of his heirs, and that he was a fraudulent trespasser. As to the mortgage of Mrs. Armstrong, however, the case stands that in consequence of the conduct of the defendants, in not giving effectual notice that Koa plaintiff was in wrongful possession of their estate, she loaned money on this security, and it is shown that this money was invested in a house and improvements on this land, of which they have now the benefit. It seems clear to me that upon all equitable principles they take the estate as charged with the benefit.

It further appeared in the case that, upon an execution following the judgment in the ejectment case, the Sheriff, after placing the present defendants in possession of the land recovered, levied upon and sold the buildings and fence as personal property of Koa, to satisfy the judgment of \$1,200 recovered against him, and that they were purchased by these defendants. Their counsel now claims that they cannot be held to another purchase of the same property. This must be held to have been attached to the real estate and forming a part of it, and as such subject only to such equities as the present. It was not leviable. By the terms of the writ of possession the Sheriff was enjoined to place the defendants in possession of the land together with the appurtenances. This he does, but then takes the appurtenances as the personal property of Koa. The sale must be treated as a nullity.

I think the plaintiff, Mrs. Armstrong, is entitled to recover the full sum of \$500 with interest from the 6th of June, 1882, the date when defendants were placed in possession of the premises.

The costs are to be paid one-half by the defendants and one-half by Koa.

Honolulu, July 8, 1884.

OPINION OF THE FULL COURT, BY AUSTIN, J.

Referring to and adopting the opinion of Mr. Justice McCully in the case below, we add that we feel no doubt of the equitable right to relief of the plaintiff, the mortgagee. The defendant for years, without legal attack or assertion of her rights, allowed the plaintiff Koa to remain in possession of the land, to lease the most of it, to build and occupy a house on the remainder, and to hold the original Royal Patent in his hands, which ran in the same

name as his. With these muniments of title in his possession, he approaches the plaintiff, Mrs. Armstrong, and obtains a loan on mortgage. That such a loan should be made seems natural, and the supineness of the defendant was the cause of the investment. The plaintiff stands like a *bona fide* purchaser. In equity she holds a title in form, which, however, is only a security for the amount loaned. But she is to be protected, doubtless, like a *bona fide* purchaser.

The principle laid down in Story's Equity Jurisprudence, Sec. 385, applies to her. "So, if a party having a title to an estate should stand by and allow an innocent purchaser to expend money upon the estate without giving him notice, he would not be permitted by a court of equity to assert that title against such purchaser; at least, not without fully indemnifying him for all his expenditures."

The mortgage money, as shown, was expended and used in building a house on the premises, which inured to the benefit of the defendant. True, the house was built by the plaintiff Koa, in fraud of the defendant, but the mortgagee was not informed of the fraud, and by the defendant's inaction and neglect she is estopped from asserting the fraud against the mortgagee.

Even though she did not know of the existence of the mortgage in suit, she must accept the legitimate consequences of her acts, which rendered such a mortgage in good faith possible, and which would be likely to, and did, result in the investment of the money borrowed in permanent improvements for her benefit, as shown.

For these reasons, and for those expressed in the opinion of our brother, Judge McCully, the decree entered is affirmed with costs.

W. R. Castle, for plaintiff.

J. L. Kaulukou, for defendants.

Honolulu, August 12, 1884.

C. AFONG *et al.* vs. CHUN TUNG AFONG *et al.*

APPEAL FROM DECISION OF THE CHANCELLOR.

JULY TERM, 1884.

JUDD, C. J.; McCULLY AND AUSTIN, JJ.

A trust deed made by plaintiff for benefit of his wife and children, and containing no power of revocation: Held, under the circumstances, not to be revocable by plaintiff on the ground of mistake; the mistake, if any, being of law.

Decision of the Chancellor affirmed.

OPINION OF THE FULL COURT, BY AUSTIN, J.

THIS cause comes here on appeal from the decision of the Chancellor, allowing the defendants' demurrer to the plaintiffs' bill. The action was brought to set aside a voluntary trust executed by C. Afong in favor of himself, his wife and children, on the ground of mistake. The trustee is party plaintiff, and brings the deed of trust into Court. It contains no power of revocation.

The case was ably and exhaustively argued before the Chancellor, and the briefs of both parties there were embodied in his opinion. The same arguments were filed with us, and additional authorities, mainly like those filed, were also presented.

The question turns almost entirely upon the absence in the deed of a power of revocation.

The authorities are conflicting as to the effect of this. But we think the law may well be treated as settled, as quoted by the Chancellor from Bispham's Equity, p. 67:

"Where the intent to make an irrevocable gift is perfectly apparent, or where, even in the absence of such a clear intent, a sufficient motive (such as protection against the grantor's own extravagance, or the like) for making such a gift exists, the settlement cannot be disturbed. But when the deliberate intent does not appear and no motive exists, the absence of a power of revocation is *prima facie* evidence of mistake."

On looking at the trust deed, bearing date June 10, 1881, we find it recites that, "Whereas, the said C. Afong is desirous of

making the provision hereinafter made for his said wife and the issue of them, the said C. Afong and Julia Afong, and in consideration of his love and affection for them, this indenture witnesseth," and thereupon the deed declares the trust attacked herein.

This is the sole motive and consideration set forth in the deed, and if this were all, we should feel that the decision might be different. The motive for such an irrevocable gift might be thought inadequate. But the bill alleges, and plaintiffs' counsel says, that the deed was executed to protect the beneficiaries in it from the supposed claim of Lee Hong, the wife whom the plaintiff had married according to Chinese custom many years before in China. He feared that she might, if she came here, be declared by our Courts to be his lawful wife, and at his decease to be entitled to dower in all his estate. Here, then, was the real motive, and the reason for making the deed irrevocable seems sufficient. It was a present danger which threatened, and seemed likely to jeopardize the interests of his wife and children. To guard against this the deed should be irrevocable.

In *Jones vs. Clifton*, 101 U. S., 225, it is held that the power of revocation, though it exist, cannot inure to the benefit of future creditors, and it is held that such a power in that case would not go to the donor's assignees in bankruptcy, the creditors all being subsequent. That power, however, doubtless would inure to the benefit of creditors existing when the deed was made, and a voluntary settlement without value could be set aside in their favor.

Now, the claim of the Chinese wife, if it was valid at all, was a present claim to support, and an inchoate claim to dower, and she stood against Afong's estate as though a creditor. And when she finally came, as alleged in the bill, her claim was settled for by the granting of a valuable immediate annuity.

To defeat or embarrass this claim, and to protect against it as far as possible the future interests of his wife and children, were the objects in view, and the motive for the strongest deed possible was apparent. Whether any deed would be effective against the danger was not the question then most to be thought of. The consideration of natural love and affection for his wife and

their children, even though held not legal or legitimate, was ample. See *Bunn vs. Winthrop*, 1 Johns. Ch., 329.

The plaintiff states in his bill that when the trust was made, he believed that he still retained the power of otherwise disposing of the trust property. He may have had such a thought, but the paramount purpose then in his mind was defense against the Chinese marriage. If, as to the other point, he mistook the law, it was not one of those special mistakes of law, partaking of the nature of fact, which form the few exceptions to the rule, *ignorantia legis neminem excusat*.

For these reasons, and for those expressed in the opinion below, the decree must be affirmed.

A. S. Hartwell, for plaintiffs.

W. R. Austin, for minor respondents.

J. M. Davidson, for the other respondents.

Honolulu, September 12, 1884.

DECISION OF THE CHANCELLOR, APPEALED FROM.

In June, 1881, C. Afong executed to W. W. Hall, trustee, a deed of his premises in Nuuanu Valley, being his principal residence. The consideration is stated to be his love and affection for his wife Julia and their issue. The trust is declared to be to the use of the said C. Afong and his assigns during his lifetime, and after his decease to the use of Julia, his wife, and her assigns during her life, and upon her decease over in fee to the Hawaiian-born children of the said C. Afong by the said Julia Afong, in equal shares to the said children who shall then be living, and the lawful issue of any such who shall have deceased, by right of representation.

The deed provides for the appointment of successors to the trustee, but contains no power of revocation or to charge the estate with debts. The settlement was entirely voluntary, but it is stated in the bill to have been made in order to avert an impending danger from a so-called Chinese wife, who was about to come to Honolulu to assert a claim to Mr. Afong's estate, and that it was executed by Mr. Afong solely to protect the beneficiaries therein named, and under the belief that he would not thereby

preclude himself from otherwise disposing of the property by will, or from charging it with debts in case it was necessary for the maintenance of the beneficiaries or otherwise, and that the omission to insert such power in the conveyance was owing solely to such belief of Mr. C. Afong. The bill further alleges that the Chinese woman came to Honolulu, but in consideration of a large annuity settled upon her, she executed a release of all her claims, present or prospective, to the estate of the said C. Afong; that it is now important for the said C. Afong to reside mainly upon his plantation on Hawaii, and to sell the said residence in Honolulu, and that, in order to do this, the said voluntary conveyance must be cancelled and revoked. The bill gives the names and ages of the children of the said C. Afong and Julia his wife, and asks for the appointment of a *guardian ad litem* for the minor children.

The trustee brings the deed into Court, and submits to the order of the Court.

(Briefs of counsel are omitted.)

BY THE COURT.

I think that the rule, concerning the power of the settlor to have his conveyance cancelled, is well laid down in the Massachusetts cases cited by the respondents' attorney, W. R. Austin, Esq.

"A voluntary settlement completely executed, without any circumstances tending to show mental incapacity, mistake, fraud or undue influence, is binding, and will be enforced against the settlor and his representatives, and cannot be revoked, except so far as a power of revocation has been reserved in the deed of settlement." *Viney vs. Abbott*, 109 Mass., 300. In *Sewell vs. Roberts*, 115 Mass., 22, the Court say: "The first question arising in this suit is whether such voluntary settlement was revocable by the settler during his life or by his will," and decides that the rule is well settled that where the conveyance is fully executed and the trust perfectly created, the settlement cannot be revoked or altered by a second settlement of the same property, in the absence of any provisions giving the settler power to do so.

Applying these principles to the case at bar, I find that the conveyance is completed and executed and the trust is fully created. The legal title to the property is vested in the trustee,

and the settlor, Afong, has parted with all his power and dominion over it, and the declaration of the trust contains no power of revoking the trust.

The bill sets up no circumstances showing mental incapacity on the part of the settlor, nor is there any fraud alleged to have existed, or undue influence to have been used. But a mistake of the legal effect of the instrument of settlement is set up, to wit: That the settlor supposed he could revoke it by will, and charge the estate with debts.

A court of equity will not ordinarily relieve a party of the consequences of a mistake of law.

See Bispham's Eq., Sec. 187.

I have no doubt that in the courts of Massachusetts this deed could not be annulled.

Many English cases are cited in the briefs of counsel, which carry the authority of equity to vacate a voluntary settlement much further than in the Massachusetts courts.

The result at which I have arrived, after an examination of these cases, is that the settlement before me should not be disturbed.

Bispham on Equity, Sec. 67, says: "It sometimes happens that the voluntary settlor himself seeks the aid of a court of equity to have the settlement revoked, and the question has then arisen whether in such instrument powers of revocation ought not to be inserted, and how far a voluntary irrevocable settlement, in the absence of any motive for an irrevocable gift, can be sustained. There has been some fluctuation of authority upon this point, but the true rule seems to be that the absence of a power of revocation is nothing more than a circumstance to be taken into account, and of more or less weight according to the circumstances of the case. Where the intent to make an irrevocable gift is perfectly apparent, or where, even in the absence of such a clear intent, a sufficient motive (such as protection against the grantor's own extravagance, or the like) for making such a gift exists, the settlement cannot be disturbed. But when the deliberate intent does not appear, and no motive exists, the absence of a power of revocation is *prima facie* evidence of mistake."

As we have seen, the deed contained no power of revocation,

but the grantor was a man of ripe years, with a large family born in this Kingdom, and an undefined danger from the claims of a previous so-called Chinese marriage was threatening him. It is difficult to see how the claim could be made good so long as Mr. Afong lived, and yet the settlement was made *prima facie* to secure the Hawaiian-born children against the claim which the Chinese wife might make to the property of Mr. Afong upon his decease. A sufficient motive here appears for making the settlement irrevocable. He wished the property to be placed beyond his power, lest the persuasions or threats of the Chinese woman should induce him to change his purpose.

I see nothing improvident or unreasonable in the terms of the settlement. The fact that an arrangement was arrived at, since the execution of the deed, between the Chinese woman and Mr. Afong, by which the danger was averted, so far from being a reason for now allowing the grantor to take back his gift to his children, is a reason for not allowing it, for their patrimony was diminished by the settlement on the Chinese woman.

The settlement was a natural one; it was for the benefit of the settlor's own children, his statutory heirs at law. None of the peculiar circumstances exist in this case upon which, in the English cases, Courts have afforded relief, and I think the demurrer must be sustained.

EDMUND AND EDWIN HART *vs.* HIEL KAPU *et al.*

APPEAL FROM DECISION OF AUSTIN, J.

JULY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

In an action against a trustee for an accounting, on appeal by both parties from the decision of the lower Court, the Court affirms the judgment below.

A trustee should keep accurate books of account; if not, every intentment of fact will be made against him.

Trustees should be allowed reasonable compensation for their time and trouble.

OPINION OF THE FULL COURT, BY JUDD, C. J.

THE judgment below was appealed from by both plaintiffs and respondents, but upon due consideration of the arguments of counsel and an examination of the evidence recorded, we have come to the conclusion that the judgment of the Court below should be affirmed.

W. A. Kinney, for plaintiffs.

F. M. Hatch, for defendants.

Honolulu, September 15, 1884.

DECISION OF AUSTIN, J., APPEALED FROM.

THIS is an action in equity for an accounting by defendants, as representatives of Kaluapihaole, deceased, for a balance of the rents and profits of the fish pond of Kupeke, in Molokai, and other property which the bill alleges deceased had in charge, as plaintiffs' trustee, for three years or more from and after August, 1878. The bill avers fraud and failure properly to account.

The answer denies fraud and trust, and alleges accounting in full to Meanui, the mother of plaintiffs. Kaluapihaole and Meanui, who best knew the facts in the case, are dead.

The evidence on both sides is indefinite and unsatisfactory. No books or memoranda of accounts are presented by either party. The answer of the administrator alleges that a book of accounts of the receipts and expenses of the fish pond were kept by Kaluapihaole, but that after his decease it was stolen from his house.

The proofs show that Henry Hart, the father of the plaintiffs by Meanui, who were his illegitimate children, had a lease of the fish pond of Kupeke and appurtenances for ten years, expiring October 2, 1881. That on January 27, 1878, he granted it and other property to Auwaelua and his successors, in trust for the use of Meanui and the plaintiffs.

Auwaelua died about June, 1878, and the proofs show, as I think, that Kaluapihaole, deceased, took charge of the fish pond and some other property about October 2, 1881. All of his dealings about the pond were with Meanui; she was living in Hono-

lulu, and the plaintiffs lived with her. Two or three letters, purporting to be from Kaluapihaole to Meanui, are produced. They bear, I think, internal evidence of genuineness.

A paper dated December, 1878, running to Kaluapihaole, whereby he was stated to be trustee for the plaintiffs, was put in evidence. It was delivered to Meanui at Honolulu, and she at about its date went to Molokai with it. There is no proof that it was delivered to Kaluapihaole. But from expressions in his letters and from the acts of parties, and all the evidence in the case, I think there is enough to show that Kaluapihaole should account as a trustee to the plaintiff in this case, and I shall so find. See Perry on Trusts, Sec. 245. I shall also find from all the proofs that payments were properly made to Meanui. She was the mother of the plaintiffs, and they were living with her at Honolulu. Kaluapihaole was at Molokai. Expenditures for them would properly be made by her as their natural guardian. The proofs of her bad habits were not enough to stamp the payments as made in bad faith.

As to the proceeds of the use of the fish pond, we have no book of account to guide us, and must resort to general evidence by those acquainted with it. It is referred to as one of the best ponds on the Islands. Many witnesses were sworn, and from their testimony the proceeds can only very indefinitely be determined. I shall not rehearse the proofs. The plaintiffs claim that the sales from the pond were almost weekly during the whole time and amounted to about \$50 a week. I think the proof does not sustain this. Some of the witnesses say that probably fish were sold from the pond once a week about half the time. I think this approximates the truth. The proof shows that Kaluapihaole had other ponds and got fish from other sources, which he sold. The proof also shows that after he got Kupeke he invested about \$2,000. For each time, from the proofs, I think the receipts above expenses, aside from the value of Kaluapihaole's services, were on an average about \$40 a week. The whole time was three years. One-half of the time was one and a half years, or seventy-eight weeks. This makes the gross receipts \$3,120. For this sum the defendant Kapu, as administrator, must account.

Out of this must come first the payments. Of payments and of

the expenses the trustee should keep accurate books of account. If not, every intendment of fact will be made against him.

See Perry on Trusts, Sec. 911.

The defendants say that books of account were kept by Kaluapihaole, but they were stolen after his death. This explanation is not very satisfactory. The defendant Kapu says he was at the house of deceased a week and a half after his death and found no papers nor letters nor account-book. It is strange what became of them all. Several witnesses were sworn as to many payments to Meanui, but not a receipt or a scrap of paper showing the amount of any payment is presented. This is remarkable. The amount of many payments are not remembered by the witnesses. This uncertainty, I think, must be taken in a measure against the defendants.

Nakumu swears that he paid Meanui not more than \$1,000 nor less than \$800. He produces no receipt or memorandum. I shall call this payment \$500. Including with this sum actual amounts proved, I make \$1,034 of payments. Many other payments are sworn to, but the witnesses do not know the amounts.

Kaluapihaole acknowledges in his letter of December, 1879, that he had from Meanui a loan of \$400, which he claims to have returned in full, including \$100 then enclosed. Most of the payments shown were after this time, some sent before may have been upon it.

For all of the payments unknown in amount it will be fair to allow \$200.

This makes, to be allowed as payments, \$1,234. The defendants must be allowed the rent, \$400. Repairs of fish pond, \$100.

The trustee must also be allowed a reasonable price for his services. He was placed in possession as manager of an estate. As such he should be allowed all proper expenses to keep up the estate, and his personal work was constantly required. The better rule now is that trustees should be allowed reasonable compensation for their time and trouble.

See Perry on Trusts, Sections 913 and 917.

The proof showed that Kaluapihaole occupied the dwelling-house and grounds at Kupeke fish pond. He had also other fish ponds which he worked in whole or in part.

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There was proof that half the net proceeds would be proper pay to an agent running a pond, but I think that would be too much to the trustee here. He had, however, important and constant duties to attend to, and I shall allow him \$5 a week for the whole time he was in charge, or \$780.

The estate of Kaluapihale is chargeable with \$3,120, and is to be allowed for expenses, payments and his services \$2,514, which leaves a balance due plaintiffs of \$606, for which sum, with interest from January 1, 1882, the plaintiffs may have a decree with costs.

Honolulu, May 12, 1884.

LOO CHIT SAM *et al.* vs. WONG KIM.

APPEAL FROM WATER COMMISSIONERS.

JULY TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

There being nothing in the testimony or the appearance of the locality pointing strongly to the fact that defendant had made taro patches on ancient kula land; and there being no data for setting aside or modifying the decision of Commissioners of Water Rights; and there being reason for the conflict and uncertainty of the evidence; the Court confirms the award of the Commissioners.

OPINION OF THE COURT, BY McCULLY, J.

THIS is an appeal from the Board of Water Commissioners of Honolulu, respecting some contested water rights in Palolo Valley. The decision of the Commissioners settles eight points in dispute between the parties, most of which the contestants now accept. This appeal we understand to call in question only whether the defendant has not, in the land called Kaauwaeloa, enlarged the territory which was from ancient times entitled to water as being taro land, and made rice patches on ancient kula

or dry land. The evidence taken by the Commissioners, and the additional evidence taken on the appeal, is contradictory upon this point. We have examined the locality. In our view, it is quite probable that the defendant has cut his rice patches westward of the line of ancient taro patches. But there is nothing in the testimony and in the appearance of the locality which strongly and preponderatingly points to a definite reduction of what has been granted to the defendant. If we set aside or modify the decision of the Commissioners, we have no data for fixing another line. A different finding would not be better supported than that which is appealed from.

There is reason for the conflict and uncertainty of the evidence. The question to be determined is what areas were once used for taro patches. But previous to the culture of rice in this country, which is of only a few years' date, and the most active extension of it only since the operation of the Reciprocity Treaty in 1876, the area of taro culture had greatly diminished. There was not one-fourth of the population existing which once subsisted on taro. Land which had been in taro patches was left dry, used as pasture, and to a great extent had lost its characteristics as taro land. Witnesses sometimes speak of the same piece of land as taro or kula, according to its use at the time. It is in testimony in this case that a block of taro patches had been dried and used as a pasture, that is, as the witnesses express it, was kula. But now the value of such land for growing crops of rice has caused them to again claim all the water they were once entitled to. In the conversion to rice patches many of the old lines are obliterated. The kuaunas or taro patch hanks are cut thin, and often cut away altogether, and the rice patches are extended over land which never had been planted in taro. The identity of the situation is destroyed. Witnesses therefore make vague and contradictory statements, affording no satisfactory basis for decision.

At the present time both parties to this controversy have water enough for their cultivation. Last year was a dry season, and the plaintiff had not enough. He claims that from that fact it is apparent that he had been deprived of some portion of his water by the defendant, who had enough. But it is not to be assumed

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as a fact that in ancient times, and under the ancient distribution of the waters, some taro patch land did not suffer in dry seasons. On the contrary, we understand that the supply was precarious as to some lands, while unfailing as to others, a fact which gave the latter a greatly enhanced value.

Thus, seeing no satisfactory and definite grounds for making a different decision, we hereby confirm the award of the Water Commissioners.

W. R. Castle, for plaintiff.

Smith & Thurston, for defendant.

Honolulu, September 18, 1884.

PUUHEANA (w) vs. LIO (k) et al.

APPEAL FROM DECISION OF THE CHANCELLOR.

JULY TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

Plaintiff alleges that by fraudulent representations she was induced to make a deed to different grantees from those she intended, and that the latter have since died; defendants demur, on the ground that the right of action lay in the parties who had been defrauded: Held that plaintiff is the proper person to bring the suit, as the representatives of the grantees whom the plaintiff intended could not compel execution of a deed.

An allegation that "plaintiff has cause to suspect and so charges," coupled with statements of alleged fraudulent transactions, is sufficient; evidence need not be pleaded.

Decision of the Chancellor, overruling demurrer, affirmed.

OPINION BY MCCULLY, J.

THE bill alleges that Puuheana intended to make a conveyance of certain estate to one Kapule and Kamakaluhi, but by fraud and misrepresentation and ignorance made the conveyance to Lio, the defendant, and Kamakaluhi, and prays that the deed may be cancelled.

The defendants demur on the ground (1) that the plaintiff is not the proper party to complain, as she had determined to alienate her land, and had done so, but that the right of action lay in the parties who had been defrauded in not receiving the conveyance alleged to have been intended. We take it that there is a difference between the fraudulent procurement of the execution of a particular deed, which is not the deed which the maker intended, and the procurement by fraudulent representations of something which the maker thereupon intends to execute. See *Bispham's Equity*, Sec. 202; *Kerr's Fraud*, p. 50. The former is held to be not voidable but void.

This is a reasonable doctrine. There may be many considerations inducing a sale besides the amount of money received. In the deed before us a money consideration is expressed. It is alleged that the grantees really intended were severally nephew and adopted daughter of the grantor. It is not necessary that the Court should make the inference that this was a deed of gift in order to hold that if there was a fraudulent substitution of a grantee, the grantor has the right to demand that the conveyance be cancelled. It is sufficient if it appear that the grantor was fraudulently made to sign a paper different from what she supposed she was signing. She should be allowed to show in Court the unexpressed considerations moving her to the sale.

The grantees whom the plaintiff intended are alleged to be dead. We do not think that their heirs or representatives could bring a bill to compel execution of a deed of gift or for a consideration, there being no written agreement to make such conveyance. If they cannot, then, be parties, the alleged fraudulent grantee and his assigns would be left in the enjoyment of the fruits of the fraud, unless the plaintiff, who was made the subject of the fraud, may be heard in Court.

The second matter raised by the demurrer is the insufficiency of allegations of fraud, of notice, etc. The bill sets forth that plaintiff has just reason to suspect, and does verily believe, and so charges a conspiracy, etc., after detailing transactions which it is alleged were fraudulently conducted. It is not a mere naked statement of suspicion. Thus, where the plaintiff alleges that she intended to make a grant to certain persons, details the story of

making, executing and acknowledging a deed which now appears to be a different one, she makes allegations which are sufficient foundation for the introduction of testimony. The allegation that the plaintiff has just reason to suspect, and so does verily believe and charge, that a certain defendant is not a *bona fide* purchaser, is the statement of what must be the result and effect of certain evidence to be produced. No one claims that this evidence should be pleaded.

In like manner it charges that sundry of the defendants had cause to suspect and were put on their inquiry as to the fraudulent character of Lio's deed before accepting their conveyances from him. This appears to us to be a sufficient ground for the introduction of evidence which may substantiate the allegation, and that the allegation could not go farther without setting out the evidence.

We are of the opinion that the demurrer was properly overruled.

M. Thompson, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, September 11, 1884.

PUUHEANA (w.) *vs.* LIO (k.) *et al.*

APPEAL FROM DECISION OF THE CHANCELLOR.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A bill by a grantor to set aside deed on the ground of fraudulent representations, dismissed.

The Court will be exceedingly cautious about setting aside conveyances upon the ground of an ignorant misunderstanding.

Decision of the Chancellor affirmed.

OPINION OF THE FULL COURT, BY McCULLY, J.

THE complainant brings her bill in equity to set aside a convey-

ance executed by her in 1879 to Makaluhi and her husband Lio, alleging that she intended the conveyance to be to Makaluhi and Kapule. Makaluhi has since deceased and the estate has fallen to Lio by right of survivorship.

The sole question in the case is one of fact. It is the testimony on both parts that Puuheana, with Lio and some others, on a day in September, 1879, went to the residence of one S. W. Mahelona, a Hawaiian member of the bar, for the purpose of having a conveyance drawn and executed.

The testimony of the complainant and of two witnesses on her behalf is that Puuheana directed Mahelona to make the deed in favor of Makaluhi and Kapule; that the consideration was to be \$1 and a provision for the support and maintenance of the grantor for life; and that when the deed was written Mahelona read it as conforming to these instructions, and the complainant, who cannot read, executed it. The deed in fact was to Lio and Makaluhi, for a consideration of \$120 and without a covenant for maintenance.

We do not think it necessary to present an abstract report of the testimony, in view of what is set-forth in the published opinion of the Chief Justice. We would point out one circumstance which is significant, upon which no comment has been made. All the witnesses for the plaintiff testify that it was after Mahelona had made a beginning of writing the instrument, Lio whispered or spoke in a low voice to him. It is strongly urged in argument for the plaintiff, that by that whispering Mahelona was induced to make the deed in favor of Lio, and not as instructed by Puuheana. By inspection of the instrument, we see that the name of Lio as grantee comes in the third line. It is added to all the improbabilities of this case that although he had begun and proceeded with the writing, he was so soon arrested and the instrument changed as to the grantee, and that upon the brief whispering the whole tenor of it changed as to consideration and covenant of support. Mahelona and Lio testify that the low-voiced words between them were only the statement of Lio that he had not brought money enough to pay for the land and the expenses of drawing and acknowledging the deed. It is in the highest degree unlikely that the attorney, to whom all parties had addressed

themselves, could so easily and in so brief a time have been induced to enter a fraudulent conspiracy. No evidence is given that drawing the deed in the form in which it stands was of any advantage to him.

We have given full consideration to all the testimony of record and we are strongly impressed with its failure to support the plaintiff's claim. It is clearly proved, in our view, that there was no fraud in the drawing and execution of the deed.

We discredit the testimony of the three witnesses who testify that different instructions were given to Mahelona and that he read to them a different instrument from that which was written. Puuheana, by her conduct and by many declarations to different parties, proves that she knew and intended the conveyance to be made to Lio for one grantee.

It is not a rare case for an elderly Hawaiian, ignorant of reading and writing, to allege that he has been imposed upon by the fraudulent reading of an instrument which he thereupon executes. There have been cases where such allegation is sustained. But the Court will be exceedingly cautious about setting aside conveyances upon the ground of an ignorant misunderstanding. The proofs must be unimpeachable; the circumstances of the case must show probable fraud, imposition and unreasonable character; the parties claiming to have suffered by their ignorance must not have slept upon their rights after discovering the alleged fraud.

To hold otherwise would offer a privilege and a premium to ignorance and greatly disturb all titles from aged Hawaiian grantors.

The case before us lacks all the features of a case entitled to relief.

We therefore affirm the judgment of the Court in Chambers.

M. Thompson and John Russell, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, November 29, 1884.

DECISION OF THE CHANCELLOR, APPEALED FROM.

This is a bill in equity to annul, on the ground of fraud, a deed of conveyance dated the 4th of September, 1879, of a piece of land at Waikiki, Oahu, held under R. P. No. 1512.

The position is taken on the part of the plaintiff that she in-

tended to make a deed of her land to Makaluhi and Kapule, but her attorney, S. W. Mahelona, who drew the deed, fraudulently inserted the name of Lio, the husband of Makaluhi, in place of that of Kapule, so that the deed was made to Makaluhi and Lio, and this the plaintiff was first made aware of when the deed was read to her after certain proceedings in Probate Court on February 20, 1883.

The witnesses on behalf of plaintiff were Puuheana herself, and Beke and Mikala her nieces. These three persons swear that they with Lio and Makaluhi left Waikiki on the 6th of September, 1879, and went to Mahelona's house and requested him to make the deed to Kapule and Makaluhi; that he assented and commenced to write when Lio went close to Mahelona and whispered something to him. When the deed was completed Mahelona read it aloud and read the names of Kapule and Makaluhi as the grantees. They say the consideration was one dollar (\$1) and that the grantees were to support Puuheana during her life. They also say that the party went to the Registrar's office and there Mr. Brown wrote Puuheana's name at her request and took her acknowledgment.

Kapule, who was a nephew of Puuheana, is dead. Makaluhi, who was a niece of Puuheana, is also dead.

Lio and Mahelona both testify that he with Puuheana and Makaluhi went to Mahelona's on the 4th of September, and that at Puuheana's request he made the deed to Makaluhi and Lio; that he paid the purchase money, \$120 in cash, to Puuheana; that she signed the deed at Mahelona's house, he writing her name. They both say that neither Beke nor Mikala were present. The name of Puuheana in execution of the deed is evidently in the handwriting of Mr. Mahelona and not of Mr. Brown. The deed bears date the 4th of September, and not the 6th. The driver Mokulehua testifies that he brought only Puuheana, Makaluhi and Lio to Mahelona's and did not see Beke or Mikala there; but a lad, Keola, says that he drove Beke and Mikala to town and they got out near the corner of Nuuanu and Beretania streets and walked thence toward Mahelona's house, where Kioula and Kamakauwila say they saw them and that they proceeded toward Mahelona's house on foot.

It is in evidence from the testimony of six other witnesses that shortly subsequent to this date Puuheana stated to them that she had sold the land to Makaluhi and Lio.

Mr. W. R. Castle, an attorney of this Court, testifies that he had bought a kuleana in a corner of the land in dispute, and wishing to extend his lot, asked of whom he should inquire about it and he was directed to Puuheana. He repeated his question to her that he desired to buy the land, and she said: "I have no interest in this land; it is sold to Makaluhi and Lio."

There was also evidence to show that Lio, after the date of the deed, collected rents of several persons who had houses upon the land and that Kapule made no claim to the land, though the complainant says Kapule collected some rents which he shared with her.

It seems to me that this case is without foundation, and it arises in this way: On the death of Makaluhi, intestate, her heirs at law supposed they inherited an interest in her property. Proceedings were then instituted in probate for administration on her estate. Puuheana swore that her name was Makaluhi and that Makaluhi's name was Puuheana. It was afterward discovered that these two women bore these names interchangeably. But the facts are undisputed that the plaintiff Puuheana is the widow of Nalaweha, the patentee. Luki, deceased, was the wife of Lio. The Probate Court decided that by survivorship the husband, Lio, was entitled to the whole estate in the land, the deed being to him and his wife jointly, and declined to grant letters of administration.

When Mr. Castle read the deed to them, Puuheana, Wailehua (Makaluhi's father), Keiki and others, no dissatisfaction was expressed. I think this suit was conceived by the relatives of Puuheana on her behalf, in their disappointment that Lio became by the operation of law the owner of the whole estate.

The numerous declarations made by Puuheana (and which are not denied) that she had given the land to Makaluhi and Lio, are weighty. These admissions against her present position go very far toward destroying her evidence; but she is old and feeble and is doubtless under the influence of others who are promoting this suit.

The remarkable agreement of the witnesses of the plaintiff as

to the date of the deed being September 6th, which is the wrong date, shows something of concert in arranging their testimony, for which counsel are not at all responsible.

Mr. Mahelona received not over \$5 for his services, and it is inconceivable that he should have committed a gross fraud upon his confiding fellow-countrymen and backed it up with perjury, for so small a sum of money.

I cannot resist the impression made upon me by the evidence that there was no fraud practiced upon Puuheana, and find the truth to be that the deed of the 4th of September, 1879, was intended to be made, as it was in fact made, to Makaluhi and Lio. For this reason the bill must be dismissed.

The amended bill alleges substantially that since the filing of the original bill the plaintiff discovered that the said Lio had had executed and delivered to Ida B. Castle a deed of conveyance of the said land, and that said Ida had afterward, to wit, on the — day of —, 1883, made a deed of conveyance of a portion of said land to Robert Lewers, and thereupon the plaintiff obtained leave to make Ida and W. R. Castle and R. Lewers parties defendant. That said deed to Castle and Lewers are clouds upon plaintiff's title. The plaintiff charges that these defendants are not *bona fide* purchasers and that Mrs. Castle obtained the deed from Lio without adequate consideration; that these defendants had notice of the fraudulent character of the deed to Lio before the purchase from Lio; that the defendants had notice of such facts and circumstances as were reasonably calculated to put them upon inquiry as to the fraudulent character of the deed to Lio, and that the defendants had reason to suspect and had heard that plaintiff denied the validity of the deed and proposed to contest the same.

The answer of Mr. and Mrs. Castle to such parts of the bill as they are advised is material for them to answer is, "that prior to the said deeds to said Ida B. Castle and R. Lewers, respectively, neither one of these defendants had notice of any fraudulent character of said deed to said Lio, or of any facts or circumstances reasonably calculated to put them or any one of them upon inquiry concerning the same, and that neither one of these defendants

prior to the taking of their respective deeds had heard or been informed that the plaintiff disputed or proposed to contest or litigate the validity of her said deed."

No evidence was offered on the part of the plaintiff to show that Mr. and Mrs. Castle or Mr. Lewers had notice of the fraudulent character of the deed to Lio.

The testimony on behalf of the defendants to show their want of notice, etc., was objected to by plaintiff's counsel on the ground that the answer does not contain the requisite averments to entitle them to the benefit of such evidence. And the counsel cited cases, notably *Boone vs. Chiles*, 10 Peters, 177, 255, to sustain the position that to entitle a defendant to the benefit of the defense of a *bona fide* purchaser, he must allege that the grantor was seized in fee, and in possession, that the defendant paid the consideration in good faith and without actual or constructive notice of the fraud.

An extended examination of the case of *Boone vs. Chiles* will show that the "deed" referred to was a mere contract of purchase, and that there was no allegation in the answer referring to the deed; the defendants merely asserted a contract to purchase; and the Court well say that "a party is not allowed to state one case in the bill or answer and make out a different one by proof."

In the case at bar the charge of being purchasers *with notice* is distinctly made against defendants, which they deny, and I think under the pleadings this was sufficient.

But having decided that the deed from plaintiff to Makaluhi and Lio must stand, there is no occasion further to discuss the questions as to the status of the subsequent purchasers. I only need repeat that there is no evidence affecting them with notice, but a positive denial on the part of Mr. Castle that he had any reason to suspect that the deed in question was fraudulent.

The bill must be dismissed.

THE BOARD OF IMMIGRATION *vs.* BENITO T. DA
ESTRELLA.

APPEAL FROM HART, CIRCUIT JUDGE, THIRD JUDICIAL
CIRCUIT.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A labor contract, made in a foreign country, to be executed here, need not be acknowledged.

A foreign law must be proved, like any other fact.

A labor contract may be cancelled for the default or misdoings of the agents and overseers of the master.

An overseer of contract labor, guilty of cruelty or misuse, is a "master," and may be punished under the law prescribing penalties for cruelty by master to servant.

Decision of lower Court reversed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS case comes up by appeal of the plaintiff from a decision of Hon. C. F. Hart, Circuit Judge of the Island of Hawaii, in favor of defendant.

It appears by the record that the defendant signed a contract in writing on the 9th of May, 1881, at the Island of St. Michaels, wherein it is stated that he is desirous of emigrating to the Hawaiian Islands, there to be employed under the direction of the Board of Immigration of the Hawaiian Kingdom, and in consideration of facilitating (receiving) a passage to the Hawaiian Islands on board the bark Suffolk, and a further undertaking that the Board of Immigration will pay or cause to be paid to him certain wages, and other undertakings as to board, lodging, medical attendance, etc., etc., therein mentioned, the defendant agreed to "duly and faithfully perform such lawful and proper labor as he may be directed to perform, under the auspices of the Board of Immigration, for and during the space of five years next succeeding the date of the commencement of such service after

arrival in the Hawaiian Kingdom; it being always understood that he shall not be compelled to labor on Sunday, or any holiday recognized by the Government, and that his services shall not be transferred without his consent," etc., etc.

It also appears that the defendant arrived at Honolulu, and was, by a written agreement, executed August 23, 1881, by the President of the Board of Immigration and the Star Mill Company, directed to labor for the said Star Mill Company, of Kohala, Hawaii.

In this agreement the Star Mill Company agree to pay the wages and to perform the other stipulations in favor of defendant originally promised and agreed upon by the Board of Immigration. The Star Mill Company agrees that the contract for the service of the said Benito Teixeira da Estrella shall not be transferred to any third party during the term of this contract, without the consent of the Board of Immigration or its agent. The Board reserves the right, on the representation of the laborer, to cancel the contract for any cause deemed by the Board to be sufficient, and to refund a proportionate amount of the money advanced by the Star Mill Company. "But if the agreement shall be cancelled by a magistrate for non-fulfillment, or violation of any of the conditions of the agreement on the part of the said Star Mill Company, then no refunding will take place."

The defendant went to Kohala under the direction above made, and has worked there for the Star Mill Company for a portion of the stipulated time. On the 24th July, 1884, he left his work, and was brought up before the Police Justice of North Kohala, and by him tried, and judgment rendered ordering him to return to the labor of the Star Mill Company. He thereupon appealed to Circuit Judge Hart. A power of attorney from the President of the Board of Immigration to G. R. Ewart, manager of Star Mill, was introduced, by which the Board authorizes G. R. Ewart to prosecute and defend in the name of the Star Mill Company, or in the name of the Board of Immigration, all cases and actions in which Portuguese and other laborers shall be a party, etc., and more especially those laborers under contracts set over by the Board of Immigration to the Star Mill Company. The defendant claimed that he went to work at Kohala for Mr. D. R. Vida, who,

it seems, was then the manager of the Star Mill Company. The Circuit Judge was unable to ascertain from the papers presented who, if the defendant was a bound servant, is his master, who for a possible breach of contract may be sued, fined and imprisoned. The point was also made that the contract was not acknowledged before a duly appointed agent, and that the contract was not stamped, as required by the laws of Portugal.

We deem that the above full statement of the case is necessary, in order to ascertain the legal status of the defendant.

Our statutes recognize two classes of labor contracts, which may be enforced under our somewhat peculiar labor laws. One class is of contracts made in this country, and the other class is of those made in a foreign country, to be executed in this. The former class is authorized by Section 1417, Civil Code, which reads as follows:

"Any person who has attained the age of twenty years, may bind himself or herself, by written contract, to serve another in any art, trade, profession, or other employment, for any term not exceeding five years."

The second class is recognized by Sec. 1418 of the Civil Code, which reads as follows:

"All engagements of service contracted in a foreign country, to be executed in this, unless the same be in contravention of the laws of this, shall be binding here; provided, however, that all such arrangements made for a longer period than ten years, shall be reduced to that limit, to count from the day of the arrival of the person bound in this Kingdom."

The contract in this case is one made at St. Michaels (a foreign country), between the Board of Immigration and the defendant. It is recognized by Sec. 1418, above quoted. It is not necessary to the validity of this contract that it be acknowledged. The law requires "all contracts for service authorized by Sec. 1417 of the Civil Code" to be acknowledged (Compiled Laws, p. 457); but these are domestic contracts only, and there is no statute requiring that contracts executed in a foreign country shall be acknowledged either in the country where made, or upon arrival in this Kingdom.

An acknowledgment to a contract is for the purpose of facilitat-

ing the proof of its execution; such is the effect given to it by the law, Sec. 5 of the Act of 1872 (Compiled Laws, p. 458). In the absence of a statutory requirement to this effect, a contract would be perfectly good without an acknowledgment.

Under an Act authorizing the Minister of the Interior to appoint agents in each election district to take acknowledgments to labor contracts, he could not appoint agents to act in a foreign country. If such were appointed, his certificate would add nothing of value to the contract, and if the contract was invalid, such an acknowledgment would not make it valid.

But the fact that the defendant made and entered into this contract is not disputed by him. The copy before the Court was introduced by him, and he has, in pursuance of the contract, received the benefit of a passage to this country, and has worked under it for some years.

We pass the question suggested, whether the contract is in conformity with the laws of Portugal, the dominion where it was made, with the remark that we have no evidence before us as to what the laws of that country are, or what they require.

A foreign law, relied upon as a defense, must be proved, like any other fact in the case.

Frith vs. Sprague, 14 Mass., 455; *Owen vs. Bogle*, 15 Me., 147; *United States vs. Wiggins*, 14 Peters, 334; *Cutler vs. Wright*, 22 N. Y., 472; *Murphy vs. Collins*, 121 Mass., 6.

But if the law of Portugal, applicable to such contracts, had been proved in the case, it would have to be established also that the want of formality in execution rendered the contract void, and was not a defect which could be cured.

We wish also to guard against committing ourselves to the view that it is essential to the binding effect here of a foreign contract, that it must fulfill the formalities required by the law of such country, the foreign law being proved. When such a case arises it will be considered.

The remaining question is, if the defendant has, by the papers in evidence, a "master" responsible under the law, whom he can call to account for cruelty, misuse or violation of any of the

terms of the contract, as set forth in the law (Compiled Laws, p. 462).

It is evident that the Board of Immigration in this case considered that the contingency might arise of the contract being cancelled by a Magistrate for default of the Star Mill Company, for it is stipulated that if the contract shall be so cancelled no refunding will take place. We think that the Board of Immigration has so far substituted the Star Mill Company in its own place as master over this servant, as to render the contract liable to be rescinded, and the laborer discharged from all obligations to serve under it, whenever, in the opinion of a Magistrate having jurisdiction, cruelty, misuseage or violations of the terms of the contract shall be duly proven. We think that the judgment of the Magistrate in such a case should go further than to discharge the laborer from the service of the immediate employer and leave his original contract with the Board of Immigration still subsisting. The servant has a right to have his original contract annulled, for this is the contract which binds him.

If the cruelty or misuseage be done to the laborer, or the violation of the terms of the contract be occasioned by an overseer or other director of the laborer, and not the actual contracting master, the result would be the same as if done by the master himself, and the Magistrate would be authorized to cancel the contract.

The Star Mill Company, like the majority of the plantation enterprises in this country, is a corporation, but it has to work through managers, agents, officers and overseers, and the laborer can rely on his contract being cancelled by a Magistrate in a case made for the default or misdoings of these agents, by whatever name they may be called.

But the law says that a "master" can be fined in a sum not less than five nor more than a hundred dollars, and in default of payment be imprisoned at hard labor until the same is paid.

We think that any overseer or director of contract labor found guilty of cruelty or misuseage is so far forth a "master" in the meaning of this law, and liable to the penalty above mentioned.

These provisions of the law are intended for the protection of the servant, and they apply in terms to contracts made abroad,

and in this country to the contracts contemplated by Sections 1417 and 1418 of the Civil Code.

Having thus found that the defendant is bound by a legal contract of service yet unfulfilled, the judgment of the Circuit Judge is reversed, and the defendant is ordered to return to the service of the Star Mill Company.

W. R. Austin, for the Board of Immigration.

W. R. Castle, for the Star Mill Company.

Honolulu, November 1, 1884.

J. O. DAVIS *et al.* vs. AFONG.

APPEAL FROM WATER COMMISSIONERS.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Commissioners of Private Ways and Water Rights are not authorized to award damages for wrongful diversion of water; but they have authority to make such orders as may be legitimate and necessary to the effectual enforcement of their judgment.

They have authority to direct the removal of dams and other obstructions of water courses.

On appeals from the decision of the Commissioners, new evidence may be introduced. Such new evidence is not confined to newly-discovered evidence, nor to the evidence of fresh witnesses.

By the rules of ancient Hawaiian agriculture, the taro patches of the konohiki are entitled to water from springs on the land.

OPINION OF THE COURT, BY JUDD, C. J.

This is a case appealed from the Commissioners of Private Ways and Water Rights of the District of Waialua, Oahu.

Counsel for the defendant moved to dismiss the appeal for want of jurisdiction in the Commissioners upon the case stated by the record and the judgment thereon. The Court overruled the motion upon the following considerations:

By the record it appears that the defendant was duly sum-

moned before the Commissioners "to answer to the demand or complaint 'Koi,' of J. O. Davis and other plaintiffs named, that the said Afong had wrongfully taken the water of the springs of 'Kalie' and 'Pahukii,' to the injury and damage of the water rights of the plaintiffs at 'Paukauwila,' and on the lands adjoining at Kamooloa on the north."

The sole provision for the jurisdiction of the Commissioners is found in Section 997 of the Code, as amended by Act of 1860, which reads thus: "It shall be the duty of such Commissioners to hear and determine all controversies respecting rights of way and rights of water between private individuals, or between private individuals and the Government," and in Section 998, as amended by Chapter 19 of 1878, that "In settling such controversies, the Commissioners shall give such decision as may in each particular case appear to them to be just and equitable between the parties interested."

The defendant coming in on the summons and joining issue on the claim of plaintiffs, there was clearly a "controversy" of the subject matter within the jurisdiction of these Commissioners. This Court, in a recent case not reported, dismissed a case for want of jurisdiction, when it appeared that one Ahuna applied to the Commissioners to determine his water rights, without setting forth a claim as against other parties, and the Commissioners proceeded to adjudicate upon his rights of water, without making other persons, whose rights were claimed to be affected, parties to the adjudication. The decision was merely a declaration or exposition of the plaintiffs' right to certain water, made *ex parte*, and no opportunity to be heard was afforded those who claimed that their rights were affected by the plaintiffs' claims. We held that, as the record failed to disclose any "controversy" between plaintiff and other parties, the Commissioners were without jurisdiction.

The Commissioners, it is conceded, are not authorized to award damages for wrongful diversion of water. Such a matter should be the subject of a civil action in the proper Court.

But it is claimed by defendant's counsel that the Commissioners have not jurisdiction to order obstructions to water channels

removed, as dams, troughs or drains, or to order banks of water courses restored, or to forbid the erection of obstructions, and, in short, to exercise the functions of a Court of Equity, applicable to the subject matter.

The counsel claim that the Commissioners have jurisdiction only to declare what the respective rights of the parties are, and to prescribe the times of use of the water to each claimant, or the distributive share of the same, and the rights being settled, equity must be resorted to, in order to protect the enjoyment of the right or to redress infringements upon it.

We do not think the Legislature intended any such limitation of the jurisdiction of the Commissioners. They are authorized, as we have seen, to render such decision as may in each particular case appear to them to be just and equitable between the parties interested, and they "have the like power to administer oaths, to punish contempts, and grant adjournments, to subpoena and compel the attendance of witnesses, to enforce judgments and issue execution for costs, as conferred by law on Police Courts." Compiled Laws, p. 296.

We construe this as giving the authority to the Commissioners to make such orders as may be legitimate and necessary to the effectual enforcement of their judgment. We think the Legislature did not intend to compel parties to establish their rights in one forum and oblige them to resort to another forum to have these rights enforced or protected. The very object of a special Court of Commissioners in each election district, supposed to possess special knowledge for this purpose, to settle controversies respecting rights of way and water rights, was to create a forum for the complete adjudication of such matters, subject to appeal. This Commission cannot, of course, create new privileges, nor apportion and distribute water arbitrarily without reference to its title.

A controversy must appear. It is difficult to know how a controversy could be occasioned except by one party taking more than his accustomed supply of water, and to accomplish this by building dams or increasing the size of old dams, or increasing ditches, or doing some act which must be stopped, in order to restore matters to the condition they were in when the acts com-

plained of were done, if the acts complained of should be found to be in contravention of the plaintiffs' right.

On reference to the numerous cases decided by this Court on appeal, it will be seen that many questions, as to the removal of dams and other obstructions, have been passed upon by the Court.

The counsel for defendant objected to the introduction, on appeal, of the evidence of witnesses who testified before the Commissioners. The statute, p. 295, Compiled Laws, prescribes that "the Circuit Court or Supreme Court shall hear and determine the case in Banco, and allow the introduction of new evidence."

This is far different from the language used in appeals from the Commissioners of Boundaries, which prescribes that the record of the Commissioners be read in evidence, "and the Court shall allow the introduction of the evidence of witnesses whose testimony is not on record, but not otherwise." Compiled Laws, p. 530. It also differs from the statute concerning appeals to the Full Court from the decision of a single Justice thereof. There the law reads that "no new evidence shall be introduced in the Court above; provided, always, that the Court above may, in case evidence is offered which is clearly newly discovered evidence, and material to the just decision of the appeal, admit the same." Compiled Laws, p. 244.

On the appeals from Commissioners of Private Ways and Water Rights, "new evidence" may be introduced. We do not consider this to be limited to newly-discovered evidence. Nor can it be confined to the evidence of fresh witnesses. We adopt a more liberal view, and allow the testimony of either new witnesses *i. e.* (those not examined in the Court below), or of witnesses examined below, if their evidence shall be new, and not a mere repetition of what was said and recorded below.

We come now to the points presented by this appeal on the evidence.

The defendant holds, as lessee or otherwise, certain parcels of land in Waialua, Oahu, upon which are several springs, called Pahukii nui, Pahukii iki, Lehua and Kalia, and other springs not named. The water comes to the surface, and makes something of a pond surrounding each spring. The water flows from one

spring or pond to another, and supplies water to many parcels or patches of land adjacent, divided by banks or kuaunas, formerly cultivated in kalo, but now mainly in rice. The water from Pahukii iki flows into the Kalia spring. From this largest pond or loko, the Kalia spring, there is an ancient ditch or auwai leading thence and passing alongside of the Pahukii nul spring; the auwai receives from it a supply of water through an opening in its banks. Further along the auwai receives another augmentation of its supply of water from the Lehua spring, after having passed through several kalo or rice patches. Thence the ditch is continued until it reaches the lands owned by the plaintiffs, and supplies them with water. On the lower and makai side of this main auwai, *i. e.*, between the auwai and the river, are many patches, formerly planted in kalo, but which are now planted in rice by defendant.

We think it is well established by the testimony that the plaintiffs have used the water for a period much over twenty years, distributing it among themselves according to well-settled times of use. For instance, the plaintiff, Davis, has the water on his lands (which he got by deed from King Kamehameha III. in 1851,) for sixty hours each week. There is no controversy between the plaintiffs. They make common cause against the defendant, who is the representative of a Chinese Company engaged in rice culture, and complain that he has wrongfully diminished the supply of water accustomed to flow in the main auwai, to their injury. That he has done this by placing two wooden troughs or drains under and across the main auwai, ostensibly for the purpose of draining the water from the rice land on the upper side of the auwai. The water that flows through one of these drains goes into the rice land of the defendant on the lower or river side of the auwai, and there is testimony that much water thus finds its way to the river and is lost.

The plaintiffs also complain that the defendant takes the water from Pahukii iki to other lands of his by a rotary screw, which thus prevents the water from flowing into the Kalia pond.

Another complaint of the plaintiffs is that the defendant has cut and trimmed the banks of the main auwai, so that whereas

formerly its width averaged three feet, it is now only a foot and a half and eight inches wide in places.

Many witnesses testify to the diminution of water by reason of defendant's acts, and Davis says the supply of water to the lands of the plaintiffs is reduced, so that whereas formerly a trough eight inches broad by six inches high would not carry off all the water, now a trough four inches wide by two inches high is sufficient.

The plaintiffs contend that, by the evidence, the patches adjacent to the springs, now held by defendant, are not entitled to water as of a right obtained by prescription. The evidence is that these patches, when cultivated in kalo, were accustomed from ancient times to be filled with water, as they needed it, directly from the main auwai, through openings made in the banks. When one patch was full, the water was made to flow into the patch next below it until this was full, and when all were full, the water would be stopped off from the main auwai, by filling the cut or opening with sods or stones. The argument is made that as these patches had no regular days allotted in which they received their water supply, but took it as they needed it, and as some of the witnesses say "furtively," no right by prescription was thus acquired.

But a large number of these patches belonged to the konohiki, or general land owner, in whose land some of these springs which supply the water are situated.

By the rules of ancient Hawaiian agriculture the konohiki patches would be entitled to water. And it is a general principle, and not disputed, that a land-owner is entitled to the use of the water originating upon his land, subject only to the rights which others may acquire by prescription. As to the patches of land in the immediate proximity of the springs not owned by the konohiki, but granted as kuleanas and now in possession of the defendant, we are of the opinion that rights of water can be acquired for them by a sufficiently long and adverse open use of such water as may be required for the cultivation of the crop, though the water be not taken during stated periods of time. But the konohiki, or owner of the lands in which these springs

are, can use as he pleases whatever water from them has not been acquired by adverse use by others.

The plaintiffs contend that they are entitled by adverse possession to the use of the auwai full of water leading from the springs. The defendant's counsel contend that "in regard to the water pumped from the defendant's lots above the ditch into either of his lots there, he has a right so to do, it being water arising from a spring upon his own land; and that by the same right they were authorized in drawing off the Pahukii water to other land of their own." The Pahukii land being lower than the auwai, it is certain that water could and can reach the auwai in no other way than by being allowed to collect on the Pahukii lots until it overflows the banks of the auwai, and also by its flowing, either as surface water or by subterranean percolation from the Pahukii spring into the lower Kalia spring. That the plaintiffs have no right to such overflow, involving as it does the necessity of keeping their land in such a condition that the water would overflow its bounds, and no right to the accretion to Kalia spring water from surface water or by subterranean percolation from the Pahukii spring: citing the below mentioned authorities in support of the position that no legal right can be acquired to the continued use of water by subterranean percolation or from surface flowing:

Acton vs. Blundell, 12 M. and W., 336; *Chasemore vs. Richards*, 7 H. L., 349; *Roath vs. Driscoll*, 20 Conn., 553; *Swett vs. Cutts*, 50 N. H., 439; *Waffle vs. N. Y. C. R. R.*, 58 Barb., 413; *Goodale vs. Tuttle*, 29 N. Y., 466; *Bliss vs. Greely*, 45 N. Y., 671; *Chase vs. Silverstone*, 62 Me., 175; Washburn on Easements, Sections VI, VII.

The principle collected from these authorities is thus stated by Washburn in his work on Easements, p. 441: "It may be stated as a general principle of nearly universal application, that while one proprietor of land may not stop or divert the waters of a stream flowing in a *surface channel* through it, so as to deprive a landowner whose estate lies upon the stream below that of the proprietor first mentioned of the use of the same, or essentially impair or diminish the use thereof; if, without an intention to injure an adjacent owner, and while making use of his own land to any suitable and lawful use, he cuts off, diverts or destroys the use of an

underground spring or current of water which has no known or defined course, but has been accustomed to penetrate and flow into the land of his neighbor, he is not thereby liable to any action for the diversion or stoppage of such water."

In the first case cited, *Acton vs. Blundell*, the Court say "there is a marked and substantial difference between the law as to the rights to enjoy an underground spring of water and that by which a water course flowing on the surface is governed." Mr. Washburn (*id.* p. 444), says that "among the considerations upon which this difference is based is that the one being notorious, whoever buys or grants it knows what passes, while the other is secret and unknown at the time of purchase and sale, and may be in its nature constantly shifting. Nor can it ordinarily be ascertained what part of the supply comes from one's own land and what from that of another. The controlling circumstance is not whether the stream was above or below ground, but whether it was or was not *ascertained and defined* as a stream. If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by any one to the injury of riparian proprietors. If the channel or course underground is known, it cannot be interfered with." *Id.* 448.

In summing up the doctrine that rights cannot be acquired in subterranean, unknown, percolating water, the learned author (*id.* 467 and 468) says: "When, in addition to the foregoing authorities, it is remembered that the common law idea of prescription implies a grant from an intelligent grantor of something with which he intends to part, to a grantee who intends to accept it, and that open adverse enjoyment in such cases is nothing more nor less than evidence of such a grant, it is difficult to see how the idea of such a grant having been made can be raised, when neither party could have known that the one was deriving anything from the other."

Applying these principles to the case at bar we find from the evidence that the water comes from these springs into the auwai in known and ascertained channels; they are pointed out by the witnesses and marked on the chart of the land in evidence.

The principles above stated refer to natural streams, but they

apply equally to artificial water courses as this auwai is. Such has uniformly been the decision of this Court.

A right by prescription can be acquired to the waters of a spring which come to the surface and make a pond and flow over or under the banks or through a cut in the same into an auwai constructed for the express purpose and conducting the water to lands where it may be used for irrigation.

It is, we think, proved in this case that the plaintiffs have acquired a right by prescription to the water flowing from the springs in question into the auwai, after the kalo patches on either side of the auwai and adjacent thereto have received a supply of water sufficient for the cultivation of kalo.

We say that the defendant is to have water sufficient to cultivate his land in kalo because this is the gauge of the amount of water used by this land from ancient times and measures the amount of water which remains to the use of the plaintiffs.

It is urged upon us that it is essential to rice culture that the land be drained dry while the crop is maturing and while, after harvest, it is being plowed for the next planting and that this must be done twice a year. It is in evidence that a month is required at the end of each crop. This would necessitate the draining off of the land for two months of the year; and as the drains run *under* the auwai, all this water would be lost to the plaintiffs during this time, which would be one-sixth of the whole time, during which the plaintiffs' supply would be lessened.

The trough or drain made from one of defendant's patches to another and lower one runs under and transversely to the auwai to the use of which the plaintiffs are entitled. This, by all the authorities, would be illegal, for the act here is not one done by the proprietor on his own land, but is a trespass upon the auwai in which the plaintiffs have an easement. This easement goes to the extent that the auwai is not to be cut, narrowed or interfered with by defendant to the injury of plaintiffs.

We think the trough or drain in Kalia spring, which takes the place and is the equivalent of the old waste gate, is not objectionable and does not impair the plaintiffs' rights.

The other drains under the auwai are a detriment to the plaintiffs, and our judgment is that they must be removed and the holes

through which they pass stopped up. The use of the rotary pump must be discontinued. The banks of the auwai must be restored so that it will hold the water on the lower side and be sufficiently wide for a person to walk on it while going to and fro in cleaning the ditch or seeing to the supply of water.

S. B. Dole, for plaintiffs.

A. S. Hartwell, for defendant.

Honolulu, November 8, 1884.

UN WONG, Administrator, *vs.* KAN CHU *et al.*

EXCEPTIONS TO RULINGS OF MCCULLY, J.

OCTOBER TERM, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

Ejectment under our statute is not merely a possessory action; it tries the title as well. It is enough to show that the persons in actual occupancy are holding under the adverse claimants in the suit.

Where plaintiff claimed the whole land, but the verdict was for an undivided half; held the verdict was proper; following *Nahinai vs. Lai*, 3 Haw., 317.

A surviving partner holds partnership property to pay firm debts, after which the share of the deceased partner goes to his heirs or administrators.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of ejectment by the administrator of the estate of Pauoa, deceased, to recover possession of certain premises on Hotel street, Honolulu, claimed by plaintiff under an unexpired lease from Kaanaana, defendant.

The case was tried at the July Term, 1884, of this Court, and resulted in a verdict for plaintiff for one undivided half of the land.

It appears by the evidence that defendants were not in actual possession of the premises, but that the defendant Kan Chu, as the lessee of Kaanaana, had sublet the rooms in the house on the land by the month to various tenants, who are not parties to this suit. At the close of the plaintiff's evidence, the defendants' counsel moved for a non-suit on the ground that defendants were shown not to be in possession of the premises. This was refused. The question raised by the bill of exceptions is whether this ruling was erroneous.

It is urged by defendants' counsel that, as ejectment is a possessory action, the suit must be brought against the person in the actual occupation or enjoyment of the land. Many authorities are cited to sustain this view. Sedgwick and Wait, Trial of Title to Land, Sec. 231. Tyler on Ejectment, p. 471, and cases cited.

By our statute law ejectment is not merely a possessory action. It tries the title as well. The language of Sec. 1118 of the Civil Code, in giving a form of the complaint, is: "In actions to recover at law any specific share or interest, or right to property, real or personal in kind, as in cases of replevin or of ejectment," and the form of declaration is given. The form requires the plaintiff to give the metes, bounds, quantity and locality of the land, and to state *the kind of title* claimed by him. Ejectment, then, may be used to recover real property, or any share, interest or right therein.

We think it sufficient for the plaintiff to show that the persons in actual occupancy of the premises are holding under the defendants, who are the adverse claimants. Such is this case. See Sedgwick and Wait, Sec. 236; *Hind vs. Tuttle*, 2 D. Chip., Vt. 43; *Smith vs. Walker*, 18 Miss., 584.

The defendant produced the lease to himself from Kaanaana and wife, dated 1st March, 1884, and plaintiff showed that the premises were occupied by sub-tenants, holding by the month, paying rent to Kan Chu.

We notice that the New York statute prescribes that it shall be sufficient for the plaintiff to aver in his declaration in actions of ejectment, that on some day therein specified, and which shall be after his title accrued, he was possessed of the premises in question, etc., etc., and that the defendant afterwards entered

into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, etc. The statute further requires that, "if the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named in the declaration." 2 Revised Statutes N. Y., p. 312.

We apprehend that in most jurisdictions the matter we are discussing is settled by statute. Of course, the judgment will only be operative against such persons as are made parties to the suit. But we do not think that we could sustain an action of ejectment merely to settle the title against an adverse claimant out of possession, the possession of the premises being shown to be in third persons holding adversely to the defendant.

In the case before us, the writ of possession on the verdict of the jury for one undivided half of the land will let the plaintiff in to the enjoyment of half the rents paid by the sub-tenants, as a co-tenant of Kan Chu, and to possession of an undivided half of the premises, when these tenancies expire. We think the Court was right in refusing a non-suit.

The next question raised by the exceptions is, whether the Court erred in refusing to charge that "no verdict can be given for an undivided half, because no demand was shown." The defendant admitted at the trial that plaintiff had demanded that possession of the premises be delivered up to him. The plaintiff claims in his declaration the possession of the entire premises. He recovered, by the verdict, an undivided half. That such a verdict can be sustained was decided by this Court in *Nahinai vs. Lai*, 3 Haw., 317. In that case the plaintiffs claimed the entire estate, but the evidence showed that they and defendant were co-heirs, and asked for and recovered a verdict for a moiety only. The Court ordered judgment on the verdict.

The remaining question requires for its complete understanding a full statement of the facts of the case.

Kaanaana leased, by an instrument recorded 9th August, 1879, but dated the 1st September, 1879, a house on the premises in dispute, to Pauoa, for a term of ten years, and by an instrument, dated 27th August, 1879, and recorded same day, Pauoa sold and assigned to Moon Hop (who is also known as Man Hop, and also as Yee Man), a half of his interest in the lease of Kaanaana, and

the instrument declares that "henceforth Moon Hop has become a partner with me, and the rents and profits received are to be divided equally, one-half to me and one-half to Moon Hop, and so also the expenses laid out on the buildings and appurtenances, one-half is to be borne by me and one-half by Moon Hop."

Further, Kaanaana, by an instrument dated the 8th February, 1880, and recorded on the 14th February, 1880, leased to Pauoa for ten years what was left unleased of the premises, and merged therein the house included in the former lease. By an instrument dated the 5th January, 1880, Pauoa sells and assigns to Man Hop one-half of his right in the lease of Kaanaana to himself, and declares that "Man Hop has come in as a partner of mine, and has an interest in my rights in the house lot, for which the lease was made, on the 8th February, 1880, and hereby Man Hop has authority to manage all the personal property of us two."

Pauoa went to China, and died in 1881. Plaintiff, Un Wong, is his administrator. Demand was made in February, 1884, by Kaanaana's attorney, of Man Hop (Yee Man) for rent. A settlement of this and other matters in controversy was arrived at, which was signed by Kaanaana and Yee Man (Exhibit F). It recites that, whereas Kaanaana has brought a suit against Yee Man for \$1,763 68 for money loaned, and for rent of the premises in dispute, and Yee Man claims to be allowed \$993 05 for goods, board and lodging, etc., for Kaanaana and family; the parties settle the matter in controversy as follows:

1st. "Said Yee Man hereby surrenders all claim to said premises, on Hotel street, being the same more particularly mentioned and intended to be demised in two certain leases of said Kaanaana to Pauoa (Pa Wong), dated respectively September 1, 1879, recorded liber 58, page 455, and February 8, 1880, recorded liber 61, page 87, and further releases all claim of or under or by virtue of said claim of \$993 05, and hereby admits that he is indebted to said Kaanaana in the sum of \$1,000," for which he gives his note, etc.

2d. Kaanaana withdraws his suit and pays costs, and also a mortgage of Yee Man's to one Hung Chung, of \$700, etc.

It is claimed by defendant's counsel that as Pauoa and Yee Man were partners in the leaseholds, this property became, on

the death of Pauoa, vested in Yee Man as the surviving partner ; that Yee Man held the leaseholds for the purpose of winding up the firm, and he did so by the instrument above referred to ; that Yee Man surrendered the interest of his deceased partner, as well as his own, to Kaanaana ; that the administrator cannot bring this action.

It is in evidence that the parties to the surrender knew of the existence of the claims of Pauoa's relatives, but that it was executed in defiance of them. Also, that the sum of \$993 05 allowed, included and settled all claims for rent by Kaanaana against the Pauoa lease. Also, that the \$1,000 for which Yee Man gave his note, was for money loaned Yee Man, and which he expended on his private account, not connected with Pauoa.

The general rules of law in regard to partnership property are well settled. The surviving partner has the title of the firm property, and holds it in trust to pay firm debts, and when the debts are settled, the property, if real, passes to the heirs of the deceased partner, and if personal, to the administrator.

In the case at bar, the partnership debts, *i. e.*, the rents due, were paid by Yee Man in the settlement with Kaanaana ; but the larger amount due by Yee Man was for private account. The title in what remained, to wit, the one-half interest in the unexpired term, passes to plaintiff, as administrator. The surrender does not cover, in express terms, the interest of Pauoa in the leasehold, and Yee Man did not undertake to execute it in a manner so as to bind him as surviving partner. To extend by implication the surrender so that it shall include the interest of Pauoa, for which no consideration was passed to his representative, would not be just. By the instrument of surrender, Yee Man sold to Kaanaana his interest in the partnership property (the lease), but that does not make Kaanaana a partner of Pauoa or his representatives. The sale by Yee Man of his interest in the partnership property puts it now out of his power to any longer act as surviving partner. He has paid the partnership debts and sold his interest. This winds up the partnership, and the interest of the deceased partner then became the property of personal representatives. Chancellor Kent, in 3 Kent Com., 37, says : "On the death of one partner, his representatives become

tenants in common with the survivor; and with respect to *chooses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor, for the benefit of all the parties in interest." "The interest of each partner in the partnership property is his share in the surplus, after the partnership accounts are settled and all just claims are satisfied."

The lease must be treated as the surplus, for, as we have seen, the debts were paid and the share of one partner sold.

We think the words in the assignment by Pauoa to Yee Man are insufficient to create a power coupled with an interest, with the incident of irrevocability of such a power, and therefore that the acts of Yee Man, in consenting that the sub-tenants should attorn to Kaanaana's new lessee, Kan Chu, do not bind the representatives of his deceased principal, Pauoa.

The defendant, Kan Chu, is not in the attitude of a bona fide purchaser for value. He is a lessee, with notice of a prior lease, for it is recorded.

The exceptions are overruled.

Kinney & Peterson, for plaintiffs.

A. S. Hartwell, for Kan Chu.

W. R. Austin, for Kaanaana and wife.

Honolulu, November 21, 1884.

W. C. PEACOCK vs. J. H. LOVEJOY *et al.*

WRIT OF ERROR TO POLICE COURT, HONOLULU.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A Writ of Error lies from the Supreme Court to Police Courts. *Kalakaua vs. Harris*, 3 Hawn., 27, reversed.

A writ of error brings up only errors of law which appear on the record; an appeal may consider errors of fact as well as of law.

Voluntary bankruptcy of lessee is not a breach of covenant not to assign without consent of lessor.

Decision of Police Court affirmed.

OPINION OF THE COURT, BY AUSTIN, J.

THIS case comes here on writ of error from the Police Court.

The action was brought to recover summary possession of land leased by the landlord, upon ground of a forfeiture by the tenant for breach of a covenant in the lease not to assign without the written consent of the landlord. The lessee, without such consent, filed a petition in bankruptcy and is now bankrupt and the defendants are his assignees. The Court below held such act was not a breach of the covenant referred to, and gave judgment for the defendants. The plaintiff failed to appeal in time as allowed by the statute, and subsequently was allowed this writ of error. The counsel for defendants moved that the writ be quashed.

The first question presented, therefore, is whether a writ of error will lie in the case. The defendants' counsel claims that the law is *stare decisis* in his favor, in the case of *D. Kalakaua et al. vs. C. C. Harris*, 3 Hawaiian, 27. That decision was made in 1867, and has not, that we are aware of, been questioned since. The plaintiff's counsel claims that the decision was an error and should now be reconsidered and reversed. As has been announced lately by this Court, such a reversal should be made with extreme caution, and only where on reconsideration it seems manifest that a

mistake or error occurred. With this principle in view we have examined with care the decision made.

By Sections 1157 to 1160, inclusive, of the Civil Code, a writ of error may issue from any Justice of the Supreme Court to the Police Justices within six months after entry of judgment, if the execution thereon has not been fully satisfied. By Sec. 948 of the Civil Code an appeal in twenty-four hours may be taken from a judgment in summary proceedings in the lower Court to a Circuit Judge or to the Supreme Court. By Sec. 1006 of the Civil Code any party may appeal in any case from the decision of a Police Justice to the Circuit Court or to the Supreme Court within ten days after decision rendered. These separate sections were passed simultaneously in the Civil Code of 1859.

In 1874 the office of Circuit Judge of Oahu was abolished, and a Judge of the Supreme Court, as the Intermediary Court, was assigned to perform some of the duties of the former Circuit Judge and Court. But the remedies for errors of judgments of Police Courts remain now what they were in 1859.

The appeal from a judgment in summary proceedings would doubtless be governed by Sec. 948, because specially mentioned therein. Sec. 1006 would not apply to that case; but with this exception the different sections may well stand together. It is impossible to say that either section abrogates or repeals the other.

A writ of error brings up only errors of law which appear upon the record sent up and must be granted before execution is collected, while an appeal may consider errors of fact as well as of law. The writ gives time to discover errors of law which the hurry incident to an appeal may have caused to be overlooked. The different remedies seem wise and consistent.

On looking at the case in 3d Hawaiian we find the only case cited in the opinion to be *Savage vs. Gulliver*, 4 Mass., 177. That case was one where a writ of error to the Supreme Court from the judgment of a Justice of the Peace was quashed because an appeal was allowed by the statute of 1783 to the Court of Common Pleas. At the time this statute was passed the right to a writ of error existed, and Chief Justice Parsons held that "the statute in giving an appeal has, in our opinion, taken away by a reasonable implication the remedy by error, unless in cases where the aggrieved

party, without any *laches* on his part, could not avail himself of an appeal."

Manifestly this case is not in point to sustain the decision in the 8d Hawaiian. With deference, we think the Court overlooked the distinction between the two cases, and committed an error which it is our duty now to correct, and we therefore sustain the issuing of the writ.

This conclusion brings us to the question on the merits whether a voluntary petition in bankruptcy, by the lessee in a lease without consent of the lessor, is a breach of the covenant by the lessee not to assign without consent of the lessor.

By Sec. 962 of the Civil Code every person owing honest debts to the amount of \$1,000 finding himself insolvent may, under oath before a Justice of the Supreme Court, declare himself a bankrupt. Assignees are appointed by the choice of the creditors, and thereafter, by Sec. 974, the Justice shall direct the Marshal to assign all the bankrupt's property to the assignees.

The plaintiff's counsel admits, and the authorities are undisputed, that the involuntary bankruptcy of such a lessee would be no breach of the covenant not to assign; but he claims that by a voluntary petition the lessee in this case has caused the assignment to be made and thereby his lease is subject to forfeiture. If this be so, then the remedy of an honest debtor who holds such a lease, to declare himself a bankrupt, and thereby try to be just to all his creditors, is cut off, except at the expense of losing to them and to himself a lease, which may, as claimed in this case, be the most valuable asset he has for the payment of his debts. This seems unreasonable.

Literally, the execution of such an assignment in involuntary as well as in voluntary bankruptcy, if considered the act of the bankrupt, is a breach of the covenant which says no assignment shall be made. The covenant makes no exception for any cause. But the law, for the protection of creditors, has long held that involuntary bankruptcy was not a cause of forfeiture. The holding in voluntary bankruptcy is not so undisputed, but we think it is sufficiently clear.

In *Bemis vs. Wilder*, 100 Mass., 446, the defendant, in Decem-

ber, 1866, filed his voluntary petition for the benefit of the insolvent laws, and thereafter his property was assigned by the Judge of insolvency to a chosen assignee. The Court said that "it is well settled that an assignment, by operation of law, passes the estate, discharged of the covenant, to the assignee; and this would seem to be so, where the transfer arises from voluntary proceedings in insolvency, as distinguished from proceedings *in invitum*, and where there is no indication that the proceedings are colorable merely for the purpose of affecting the transfer in fraud of the lessor." This case is exactly in point. See also *Smith vs. Putnam*, 3 Pick., 220; *Doe vs. Carter*, 8 T. R., 57; *Jackson vs. Corliss*, 7 Johns., 530. In these last two cases judgments were confessed, but not fraudulently, and executions thereon issued upon which the leases were sold.

See Taylor's Landlord and Tenant, Sec. 408. *Doe vs. Powell*, 5 B. & C., 308.

The plaintiff relies on *Shee vs. Hale*, 13 Vesey, 404. It is not in point, for the Court there held, that the intention of the testator to make the annuity, sought to be forfeited to creditors, personal to his son, who assigned in insolvency, was undoubted, and so there was a forfeiture.

It is undisputed that a landlord may prevent the operation of the rule herein applied by stipulating that the lease shall not so pass. See Taylor's Landlord and Tenant, Sec. 409. *Shee vs. Hale*, and note.

The case of *Holland vs. Cole*, Hurlst. & C., 67, goes nearest to sustaining the plaintiffs' position, but in important respects may, we think, be distinguished from the case at bar. The lessee in that case executed a voluntary deed of assignment for the benefit of his creditors, under the new Bankruptcy Act of 1861. Pollock, C. B., says that formerly such an assignment was an act of bankruptcy and void, and so the lease was not assigned; citing the case from 5 B. & C., above cited; but that now, by the new act, such an assignment, if certain conditions were fulfilled, would be valid, and he holds the assignment to be voluntary, and to work a forfeiture, those conditions having been complied with. One of these conditions was that three-quarters in value of the creditors, whose debts amount to £10 or upwards, should consent.

So, whether the assignment would stand or not was uncertain. If the conditions were not complied with, the assignment would be void. It was, in effect, allowing the bankrupt, if consented to, to select his own assignees.

Our statute, Sec. 978, provides that every assignment by an insolvent, or one having committed an act of bankruptcy, except upon a good consideration, to a *bona fide* purchaser having no reasonable cause to believe him to be insolvent or bankrupt, shall be void. If, under this condition, an assignment should stand, because taken for value in good faith, doubtless the clause allowing forfeiture would apply. But no such assignment was made, nor was any assignment directly made in this case, and if made by implication it was void. We think the case of *Holland vs. Cole* not against our conclusion, but in so far as it may seem to be so, we believe it to be error.

For these reasons the lease was not forfeited, and the judgment of the Police Court must be affirmed.

F. M. Hatch, for plaintiff.

E. Preston, for defendant.

Honolulu, November 21, 1884.

KAANAANA *et al.* vs. J. L. RICHARDSON.

APPEAL FROM WATER COMMISSIONERS.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Decree of Commissioners modified.

UPON hearing the testimony offered, and on examination of the record of the Water Commissioners, we are of the opinion that the decree of the said Commissioners should be modified, as claimed by the defendant, namely, to the effect that the plaintiffs are entitled to one-half the water of the Kolalua stream at night only, from the hours of 5 p. m. to 5 a. m.

E. Preston, for defendant.

Honolulu, November 3, 1884.

OCTOBER, 1884.

A. G. ELLIS *vs.* G. N. WILCOX.

EXCEPTIONS FROM RULINGS OF AUSTIN, J.

OCTOBER TERM, 1884.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Defendant bought of plaintiff sixty shares in an incorporated company ; and five certificates of stock, representing said shares, were delivered to defendant, who handed them back to plaintiff, to be exchanged for one certificate for the same stock, to be made out in defendant's name ; when the new certificate was tendered to defendant, he refused to receive it:

Held, the sale was complete by the defendant accepting the five certificates, and was not rendered incomplete by the defendant returning the five certificates to be exchanged for one.

If there is no conflict of evidence as to the facts, the question of delivery and acceptance in a sale of personal property is for the Court ; if there is contradictory evidence, the question should be left to the jury.

Exceptions overruled.

OPINION OF THE COURT, BY AUSTIN, J.

THIS action was brought to recover \$4,200 and interest, as the purchase price of sixty shares of the capital stock of the Honolulu Ice Works Company, a corporation established and existing under the laws of this Kingdom, and claimed to have been sold and delivered by the plaintiff to the defendant.

The action was tried before Mr. Justice Austin and a jury, at the last July Term, and a verdict was rendered for the plaintiff, as he claimed, and the defendant appeals to this Court.

The plaintiff's and defendant's witnesses disagree as to the facts. Upon the plaintiff's showing, the defendant offered to buy the sixty shares of stock at \$70 a share, and thereupon five regular certificates of the stock, aggregating sixty shares, were endorsed by the parties in whose names they were issued, and were handed by the plaintiff to the defendant, and he took them, counted and examined them, and said they were all right, and said he would pay for them in the morning, and then said that he would like to have them in one certificate. The plaintiff then

said if the defendant wished he would get the stock in one certificate in defendant's name. The defendant thereupon took the certificates out of his pocket and handed them back to the plaintiff, who took them, and thereafter surrendered them at the office of the company, and procured a certificate for sixty shares in the defendant's name, and the next day it was tendered to the defendant, who refused to receive or pay for it, whereupon this action was brought.

The defendant says he made the offer of \$70 a share for the stock, and the plaintiff said he would take it. The defendant then said, "I did not expect you to accept that offer," and plaintiff said, "It's a bargain." That when the plaintiff had endorsed the certificates, he came up to defendant with them in his hand, and counted out sixty shares. Defendant said, "I don't want them; I don't know what to do with them." Plaintiff said, "I will get them changed for a new certificate," and started for the door. Defendant said again that he did not want the stock, and the next day declined to receive or pay for the new certificate for sixty shares on its being tendered to him.

The questions in the case arise on exceptions to the Judge's charge.

The Judge charged that the sale was complete upon the defendant's acceptance of the endorsed shares, with the intention to appropriate them to his own use, and that his returning them for the purpose of having them replaced by a new certificate in his own name, was not enough to make the sale incomplete. This was excepted to, upon the ground that it assumed that such intention was proven or admitted, and left nothing for the jury to find, either upon the direct facts testified to, or upon the inference to be drawn from those facts.

In considering this exception, or any exception, to a charge, the charge must be looked at as a whole. Another point stated to the jury by the Court was that if the facts were as shown by the defendant, the verdict must be in his favor, and whether that were so, or the facts were as shown by the plaintiff, was left to the jury, so that exception as a whole is untenable.

The only point of moment to be examined is the last clause excepted to, that the return of the five certificates, to be exchanged

for one in defendant's own name, was not enough to make the sale incomplete.

The authorities cited by defendant's counsel are ample, and unquestioned by us, that if in a contract of sale any thing remain to be done by selection, by measurement, by alteration of the thing sold, or by taking possession, the delivery may be held incomplete, and the sale unaccomplished, and whether to be so held is usually a question for the jury.

Section 1483 of the Civil Code enacts that if certificates of stock in a corporation are issued, the stock may be transferred by the endorsement and delivery thereof. This provision substantially accords with the law in all commercial countries, so far as we have heard.

Now, the five certificates of stock aggregating sixty shares, in the hands of the defendant, were of the exact commercial value of the one certificate for sixty shares afterwards tendered to him. Having the five in hand, the defendant, by surrender of them at the office of the corporation, could require one certificate instead thereof, and, having the one, could at will require the five for it. Either, when in hand, includes the power to get the other. The kind of paper the certificates are written on, the nature of the handwriting, even the words used, or the date, or the name of the certifying officer are of no moment; if the certificate is a legal certificate, it is exactly equivalent in value to another or others of the same number of shares. The material of the certificates constitutes no part of their value.

If, then, the defendant, having the five certificates in hand, said they were all right, and asked the plaintiff to get them exchanged for the one, he made the plaintiff his agent for that purpose, and if the next day, when the one certificate was tendered him, he had taken it, it would have included the right at any time of getting by surrender five certificates of the same amounts and worth the same as those originally given up. It is impossible to conceive that the rule cited, of something left to be done which renders the sale incomplete, can apply to this case.

If this be so, then the part of the charge complained of was right in law, and but little else remains of the defendant's case.

The defendant excepts to the instruction that, "if the facts were as testified to by the witnesses for the plaintiff, the plaintiff

was entitled to a verdict in his favor;" and to the instruction that it "was for the Court and not for the jury to say what facts constitute an acceptance."

These exceptions must be treated as applied to the facts of the case at bar. The charge was not written, and we have no shorthand reporter. If the literal words of a charge are abstractly considered, many a sound direction might be construed unsound. This would not be fair to the Court or the litigants.

The question in the case was whether there was a delivery and acceptance of the stock.

In *Hatch vs. Bayley*, 12 Cush. 27, Shaw, C. J. says that the delivery is a question of law on undisputed facts. In *Perkins vs. Hinsdale*, 97 Mass. 157, the Court say: "If in a contract to sell, the conversation was chiefly oral, not absolutely distinct in its terms or consistent in its different parts, and its effect partly depends on inference to be drawn from it," the question goes to the jury.

In *Merchants' National Bank vs. Bangs*, 102 Mass. 291, the Court say, in a case where the question was as to the sale and delivery of car-loads of corn: "Practically, the difficulty is to ascertain, when the evidence is meager or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain as matter of law that the evidence will justify a finding but one way."

In *Lane vs. Old Colony R. R. Company*, 14 Gray 143, in an action of replevin, where defendant claimed a special lien for balance of freight unpaid, the facts were undisputed, and the Court held, as matter of law, that the lien was good.

In *Hardy vs. Potter*, 10 Gray 89, the Court charged that if certain facts were true, they would constitute a delivery, and it was held right.

In *Wood vs. Tassell*, 6 Q. B. 234, quoted from in Benjamin on Sales, Section 681, the suit was for delivery of hops, part of a larger quantity in warehouse of one Fridd. The plaintiff was informed, after the sale, that the hops were at Fridd's, and went there, and had them weighed and took away part, and before he went for balance, they were seized by a creditor of the vendor;

held that the delivery by defendant was all he was bound to make. In this case it is worth remarking that Lord Denman, in delivering the judgment, said: "I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought not to have given the plaintiff a delivery order, though not expressly required in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that, under the circumstances, Fridd held the hops as agent for the plaintiff." See also Benjamin on Sales, Sections 679, 682 to 693; 362.

These cases, and others like them, of which there are many, are decisive of the question at bar. In frequent instances whether there is a delivery and acceptance is a matter of uncertainty, and then the decision should be left to the jury. There are cases which hold that whether there are delivery and acceptance are questions for the jury, but those cases are where the evidence is doubtful or equivocal.

Where the article to be sold is of large bulk, and cannot be taken possession of at one time, or where it is a part of other merchandise and has to be separated or measured, or where the time or method of delivery is not sure, then what was the intention of the parties is obscure, and may well be left to the jury.

But the delivery of commercial paper or stock certificates, as in this case, leaves room for no such doubts.

If the sole proof had been, as the plaintiff showed, that he offered the stock to the defendant, and the defendant said he would take it, and thereupon the certificates were indorsed and handed to the defendant, and then he took them, and said "It is all right, and I will pay for them in the morning," the delivery and acceptance would have been complete as matter of law. If upon such sole facts the jury had found for the defendant, the verdict would have been set aside, as entirely against evidence.

If, on the other hand, the sole facts were as testified by the defendant, and he never had the stock in his hand; whatever else may have been said or done by him, there would be no de-

livery in law, and the sale would be incomplete, and a verdict against the defendant would have been set aside.

These two hypotheses were submitted to the jury. Such submission was beyond doubt usual and lawful; not to have submitted it would have been error. The jury in this case were entitled to a direction as to what would, if found by them, constitute delivery and acceptance, and therefore entitle the plaintiff to a verdict.

The jury, after long deliberation, delivered a verdict for the plaintiff, thereby finding that the facts testified to in his behalf were true.

This verdict cannot be gainsaid.

One item of the charge, given at the defendant's request, was that "there must be an actual receipt by the buyer, with the ultimate intention on his part to appropriate the stock to his exclusive use, and to place it under his exclusive control; otherwise there is no acceptance; and that the seller must have so divested himself of the possession of the property, and the buyer must be so vested with it as to become the absolute owner, discharged of all lien for the purchase money on the part of the seller."

The defendant's counsel claims that upon this instruction the evidence does not sustain the verdict, and, further, that it is inconsistent with the other instruction given.

If what we have said as to those instructions, and as to the verdict, are right, then the last instruction was not inconsistent with the others given.

On all the points in the case the verdict must be sustained. Exceptions overruled. Judgment affirmed.

F. M. Hatch, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, November 24, 1884.

See Wilcox vs. Ellis, post.

BISHOP & CO. vs. COMMISSIONERS OF CROWN LANDS.**EXCEPTIONS FROM RULINGS OF AUSTIN, J.****OCTOBER TERM, 1884.****JUDD, C. J.; McCULLY and AUSTIN, JJ.**

Payment of rent to the Land Agent of the Commissioners of Crown Lands binds the Board.

Receipt of rent by lessor, after breach of covenants of lease known to him, is a waiver of the breach.

Assignee of the lessee may sue lessor for breach of covenant of quiet enjoyment.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action to recover the sum of \$8,000 damages for breach of covenant of quiet enjoyment in a lease made by the Commissioners of Crown Lands of the premises in Honolulu known as "Honolulu Hale."

The complaint in effect states that the lease was made on the 27th of December, 1880, to Whitney and Robertson for the term of ten years from 1st of January, 1881. On the 1st of January, 1882, Whitney sold his interest in the lease to Robertson, and on the 12th of January Robertson, with the consent of the defendants, assigned the lease to plaintiffs by way of mortgage. The lease contains a full covenant for the quiet enjoyment during the term against the lawful claims of all persons. By a decree of the Supreme Court, Ruth Keelikolani and Emma Kaleleonalani were decided to have lawful right and title in fee to the said demised premises, and they evicted the plaintiffs from the premises, and the defendants' covenant for quiet enjoyment has been broken and the lease has become of no value.

The complaint also alleges that the defendants had never re-entered for the purpose of enforcing any forfeiture for breach of condition, and that all forfeitures have been waived by defendants.

The lease contains a covenant by the lessees not to assign the

premises without the written consent of the lessors, and a right of re-entry on breach. It was proven in evidence that \$200 rent, accruing since the assignment to Bishop & Co., was paid by Robertson and accepted by one of the defendants, the Land Agent and Commissioner.

The jury rendered verdict for plaintiffs for the amount claimed.

At the trial the presiding Justice ruled, on objection to the introduction of the evidence, that the written consent to the assignment to the plaintiffs by the Crown Commissioner and Land Agent alone was insufficient, but that the receipt by the defendants, as stated, of rent accruing after the assignment was made, operated as a waiver of the breach of the condition in the lease not to assign.

It is contended by defendants' counsel that this is erroneous and the plaintiffs are not entitled to recover in this action because there is no privity of contract between them and the defendants. The payment of rent was not made by plaintiffs as the assignees of the lessee Robertson, and so it does not constitute a waiver, nor recognize their rights under the lease.

We think that payment of rent to the Land Agent, under the statute creating the Commissioners of Crown Lands, binds the Board. It is not required of a lessee that he shall secure the receipt of the entire Commission.

The naked question of law remains as to the effect of this acceptance of rent. In Woods' L. and T., Sec. 323, it is laid down that "an assignment, even when expressly forbidden by the lease, and when, by the terms of the lease, a forfeiture is provided for its breach, is nevertheless valid and passes the estate to the assignee subject to the consequences of the breach, and the landlord may waive the forfeiture either expressly or impliedly, by personally accepting rent that accrues subsequent to the assignment, knowing the fact that such assignment has been made." The case in support is *Goodright vs. Davids*, Cowper, 803. Here Lord Mansfield (in 1778) said: "This case is extremely clear. To construe this acceptance of rent due since the condition broken a waiver of forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord has a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That

shows he meant the lease should continue. Cases of forfeiture are not favored in law; and where the forfeiture is once waived the Court will not assist it." In a case in the same volume, *Cheney vs. Batten*, Ashton, J., said: "When an ejectment has been brought on the Statute of 4 George for the forfeiture of a lease, there being half a year's rent in arrears and no sufficient distress in the premises; there acceptance of rent afterward by the landlord has, I believe, been held a waiver of the forfeiture of the lease; which may well be, for it is a penalty, and by accepting the rent the party waives the penalty."

In *Shattuck vs. Lovejoy*, 8 Gray, 204, the Court say: "The breach of covenant by the lessees, by assigning the lease and permitting other persons to occupy the premises, without the approbation of the lessor, or those having his estate in the premises, did not terminate the lease and revest the estate in the lessor or his assigns."

In *Rogers vs. Snow*, 118 Mass., 118, the Court held that a breach of condition in a lease which provides that, in case the lessee neglects to perform his covenants, the lessor may, while such neglect continues, enter upon the premises and expel the lessee, and that upon such entry the term shall cease, does not work a forfeiture of the lease without entry. The Court, per Morton, J., say: "Under this the lease may be terminated upon the refusal to pay rent, at the election of the lessor; but it is clear that unless he enters while the default continues the lease remains in force."

But to give acceptance of rent in such cases the effect of waiver, the lessor must be aware of the assignment.

In *Gregson vs. Harrison*, 2 Term, 430, Ashhurst, J. said that it did not appear that the landlord was cognizant of the forfeiture. "The giving of the receipt by the landlord for rent subsequent to the time of the forfeiture is indeed an acknowledgment of the tenancy, but that is only where he knows the act of forfeiture at the time."

In the case at bar the Commissioner and Land Agent consented in writing to the assignment to the plaintiffs. This must be held to be knowledge of the assignment and was notice to the whole Board.

But it is urged upon us that the plaintiffs have no privity of contract with defendants and consequently have no right to bring this action. By all the authorities a covenant for quiet enjoyment runs with the land and is therefore binding on the assignees of the reversion. It may also be rendered available by the assignees of the term. Wood, L. and T., Sec. 366.

Campbell vs. Lewis, 3 B. and Ald., 392, is a case quite similar to the one at bar. An action for damages for breach of covenant for quiet enjoyment by an assignee of a lease was sustained on the ground that there was a *privity of estate* between him and the lessor. Holroyd, J., says: "I am of opinion that this action is maintainable upon the covenant, whether any estate remain in the covenantor or not, for it is a covenant running with the land." In this case it was conceded that there was no privity of contract.

The earlier case of *Middlemore vs. Goodale*, Cro. Car., 503, had decided where a party grants an estate in fee, with a covenant for further assurance, and his grantee grants it over to A, that A may maintain covenant against the original grantor on the ground that a privity of estate exists between them. The same question arose upon a chattel real and was decided the same way in *Noke vs. Awdler*, Cro. Eliz., 873, 436.

There is privity of estate between the defendants (lessors) and plaintiffs, who are the assignees of the term, there having been no re-entry for breach of condition.

The exceptions are overruled.

A. S. Hartwell, for plaintiffs.

Attorney-General Neumann, for defendants.

Honolulu, December 1, 1884.

J. T. WATERHOUSE vs. J. D. SPRECKELS and W. G. IRWIN.

**APPEAL FROM DECISION OF THE CHIEF JUSTICE ON DEMURRER.
OCTOBER TERM, 1884.**

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Plaintiff, in 1864, wrote to W. L. Green a letter of apology, and authorized him to print and circulate 100 copies thereof. In 1884, defendants, as plaintiff alleges, intending to injure the character, feelings and reputation of the plaintiff, and without knowledge or consent of said W. L. Green, published and circulated several hundred copies of said letter, to the damage of plaintiff to the amount of \$50,000.

Held, reversing the decision of the Chief Justice, that the time and manner of the publication complained of made it a libel; that action for a libel cannot be sustained, for it is the plaintiff's own letter; and that damages cannot be severed, and classed partly as injuries by libel, and partly by unauthorized publication of a private letter.

Demurrer sustained.

Judd, C. J., dissenting.

OPINION OF THE COURT, BY AUSTIN, J.

THIS is an action to recover damages for personal injury. The defendants demurred to the complaint; the Chief Justice overruled the demurrer, and the defendants appealed to this Court.

The allegations of the complaint, in substance, are that the plaintiff, in 1864, wrote to W. L. Green a letter, which is quoted, being an apology for misstatements acknowledged therein to have been made to injure the said W. L. Green, and the firm of which he was a partner, in their business and reputation, and in which the writer says that he encloses a check for \$300 to pay expenses in a suit for slander then pending against the writer, also to pay for 100 printed copies of the apology, should Mr. Green desire to print the same, in order to give him opportunity for circulating them to repair any injury which he might have suffered by what the writer had said or done.

And, further, the complaint alleges "that on the 7th day of June, 1884, the defendants, intending to injure the character, feelings and reputation of the plaintiff, did, without the knowledge or consent of the said W. L. Green, or of the plaintiff, wrongfully and injuriously print, publish and circulate, or cause to be printed, published and circulated, a large number, that is to say, several hundred copies of the said letter, and did so wrongfully and injuriously cause the said copies of the said letter to be distributed and delivered to divers residents of Honolulu, and other persons residing in this Kingdom." All of which actions and doings by the defendants, the plaintiff alleges, were done in contravention of his private rights under the laws, and to the damage of the plaintiff to the amount of \$50,000.

The first question to be considered is the nature of the action. The Chief Justice held that it is not and cannot be treated as an action for civil damages for a libel. On further examination of the complaint and the law, we think that, under our statute, the holding of the Chief Justice was error.

Our statute declares (Section 1, Penal Code) that "a libel is a publication in writing, print, or by a picture, statue, sign, or a representation other than by words merely spoken, which directly tend to injure the fame, reputation or good name of another person, and to bring him into disgrace, abhorrence, odium, hatred, contempt or ridicule, or to cause him to be excluded from society." Sec. 5 declares, "In every prosecution for writing or publishing a libel, the defendant may give in evidence, in his defense upon the trial, the truth of the matter contained in the publication charged to be libelous; provided, however, that such evidence shall not be deemed a justification, unless it shall be further made to appear on the trial that the matter was published with good motives, and for justifiable ends."

The principle that in criminal prosecutions for a libel the truth is no defense, unless published with good motives and for justifiable ends, is now substantially matter of statute in England (6 and 7 Vict.: See Odgers on Libel and Slander, 390) and is almost universally the law in America by statute, or constitution, or decision.

Prior to the statute of Victoria in England, since the reign of

James I, the truth was no justification in a criminal case. 2 Kent, 19.

But in civil cases for libel or slander, for over a hundred years, the law has been settled everywhere that the truth, when pleaded and proved, is a defense, whether the damages claimed are general or special, and however malicious the publication may have been.

See Kent, pp. 19 and 25; Odgers, pp. 169 and 289.

The reason of the distinction is apparent. Criminal punishment is attached to libel because it is believed to tend to a breach of the peace. Slander has never been so punished, because from its comparatively ephemeral nature it was held not to endanger such a breach. In civil actions for a libel, as the very action brought shows that no breach of the peace is likely or intended, the truth is a defense. 2 Kent, pp. 16 and 19.

In actions for civil damages for a libel, in Chitty and the well-settled English precedents, the allegations are that the libel is false.

In the proofs at the trial, however, falsity need not be first shown, though averred, but truth comes in as a defense, and properly the averment of falsity should not be required, nor is it required here.

Odgers, p. 169.

Our statute defines a libel to be a publication in writing, etc., which directly tends to injure the fame, reputation or good name of another person, and to bring him into disgrace, etc.

It is libel if it tends to disgrace a person, and to injure him in either of the particulars named. Proof of injury in all these respects is not necessary, nor need it be alleged.

The allegation in the case at bar is of injury to the character, the feelings and the reputation of the plaintiff. The publication, as quoted in the complaint, is manifestly libelous in its nature, and the time and manner of its publication, as averred, after twenty years of silence, against a merchant, a private citizen, made it libel, punishable under our statute, whether true or false.

The complaint positively affirms that the article published is true, but the other statements alleged, if taken as true, show libel of which defendants might be convicted on indictment. The de-

defendants have the benefit of the allegations in the complaint as though written in the answer; and upon these and upon all the facts set forth, there can be no recovery in this action unless we overturn the well-settled authorities of a hundred years. Whether published matter which is counted on is a libel depends upon its nature, and not upon the kind of action in which it is set forth or upon its truth or falsehood.

It is also held that an injunction to restrain the publication of a libel will not lie except after verdict of a jury declaring the publication to be libelous.

Odgers, pages 13 and 16, and cases there cited.

If this action, therefore, were brought against the defendants to restrain the further publication of what manifestly appears in itself to be a libel, it could not on that ground prevail; but it may be, under the authorities quoted by the Chief Justice, and by reason of the plaintiff's property in the substance of the writing, as its author, that the defendants having it in hand, however obtained, might because of such property be restrained from its further publication.

The publication, however, being made, that act done, as we have shown, constitutes it a libel, and the damages thereby occurring are damages in consequence of a libel, and cannot be otherwise recovered for. Those damages cannot be severed, and classed partly as injuries by libel and partly by unauthorized publication of a private letter, which might have been enjoined.

For these reasons the decision below must be reversed and the demurrer sustained.

CONCURRING OPINION OF MR. JUSTICE MCCULLY.

In this matter I arrive at the same conclusion with Mr. Justice Austin, that the demurrer should be sustained, and had written my opinion at somewhat greater length than is here appended. It will be unnecessary to restate the case a third time.

It seems very clear that action cannot be sustained on the complaint in this case as for a libel, for it is the plaintiff's own letter. The counsel for the plaintiff concedes this in his argument before us, although citing Cooley on Torts, p. 208, *note*, for authority that the truth of the publication is not always a defense in civil cases.

We find this note to be only an expression of the learned author's opinion of what the law ought to be, against his statement in the text of what it is. He says in the note: "It is questionable whether the law ought not to hold truthful publications libelous in some cases where they relate to matters that no one has any business to bring before the public at all and are made with no other purpose than to annoy and subject to ridicule. Thus it is conceivable that the most innocent acts in a man's private life or personal peculiarities for which he is in no way responsible may be so made use of by a mischievous person as to destroy the comfort of life, and it seems unreasonable that no personal redress can be had. * * * It would seem that there ought to be some remedy besides such as the public authorities may see fit to pursue."

We have then the opinion of this distinguished jurist that for such a class of cases as he instances there is no remedy by civil action, although contrary to a sense of justice. The law in respect to words of most injurious character to feelings and reputation has been characterized by Lord Campbell as "unsatisfactory," and Lord Brougham would substitute the word "barbarous."

Chancellor Kent says: "There is much justice and sound policy in the opinion that in private as well as public prosecutions for libels the inquiry should be pointed to the innocence or malice of the publisher's intentions. The truth ought to be admissible in evidence to explain that intent and not in every instance to justify it."

I understand the effect of these eminent authorities to be that a plaintiff cannot maintain a civil action for libel by the publication of his own letter, although they regret that a mischievous or malicious publication may not be a ground of action for recovery of damages.

But if it is not to be maintained as a libel, although it is a publication of and concerning the plaintiff, what grounds of action appear? It is clear by the authorities that Equity will enjoin the publication of letters on the ground of exposing private confidence, but it does not follow that if the publication of the latter class have been made that damages can be recovered for injury to the feelings or reputation of the writer. There cannot be said in the present case to be a violation of confidence, for the writer had sent

the letter with leave to publish and it had been published. There is no allegation of a loss to the writer by a second publication and his claim is not for loss but for damage to reputation.

The plaintiff also relies upon the provisions of Sec. 1116 of our Civil Code. This gives a form in which actions may be brought upon unliquidated demands. It is the complement of the form given in Sec. 1100, for actions on vouchers certain or computable by the Court, and of the form given in Sec. 1118 for the recovery of specific property. It (Sec. 1116) covers the wide range of all common law actions not coming within the specific limits of the other two. But it cannot be considered that this meagre form thereby dispenses with the application of all the settled principles of common law actions. If it would, this action might be treated as a libel, whatever requisites of such an action, as held by all the authorities, it might lack. The form leaves all these to be maintained by this parenthetical clause ("here set forth the cause and the manner in which the injury was done, circumstantially with the view to proof")—that is to say, set forth a legal cause of action with legal claims for damages.

If an action is brought for a publication, it must set forth legal grounds for recovery of damages, or that such publication produced a loss to the plaintiff. Failing this, the form is empty.

DISSENTING OPINION OF CHIEF JUSTICE JUDD.

I feel obliged to adhere to my former opinion on the demurrer. I think that there is a remedy in *case* for the injury complained of, distinct from the conventional action of libel; and for this reason respectfully dissent from the above opinions of my learned brethren.

A. S. Hartwell and *E. Preston*, for plaintiff.

Paul Neumann and *F. M. Hatch*, for defendants.

Honolulu, December 30, 1884.

OPINION OF CHIEF JUSTICE JUDD, APPEALED FROM.

This is an action on the case to recover \$50,000 damages, resulting to plaintiff for injury done by the defendants to the character, feelings and reputation of the plaintiff. The declaration alleges:

1. That for thirty years and upwards the plaintiff has carried

on, and still carries on, the business of a general merchant, importer and retail storekeeper in the city of Honolulu.

2. That in the year 1864 the plaintiff had certain disputes and differences with one W. L. Green, a merchant, then and now residing in Honolulu,

3. That in order to settle and arrange the said disputes and differences, the plaintiff wrote and sent a letter to the said W. L. Green, a copy whereof is annexed to the complaint, marked "A."

4. That by the said letter the plaintiff authorized Mr. Green, but no other person, to print and circulate, should he so desire, 100 copies, but no more, of the said letter.

5. That on the 7th day of June, of this year, the defendants, intending to injure the character, feelings and reputation of the plaintiff, did, without the knowledge or consent of the said W. L. Green or of the plaintiff, wrongfully and injuriously print, publish and circulate, or cause to be printed, published and circulated, a large number, that is to say several hundred copies, of the said letter, and did so wrongfully and injuriously cause the said copies of the said letter to be distributed and delivered to divers residents of Honolulu, and other persons residing in this Kingdom.

All of which actions and doings by the defendants, the plaintiff alleges, were done in contravention of his private rights under the laws, and to the damage of the plaintiff to the amount claimed.

The defendants demur, and say that the complaint is insufficient in law, and urge particularly :

1. That the complaint does not allege that the letter published is untrue or defamatory.

2. No special damages can be recovered, for none are alleged to have resulted.

3. General damage cannot be presumed from publishing the truth. The truth is a complete and perfect answer to a civil suit for libel.

Townsend on Libel, p. 211 ; Odgers on Libel, p. 169.

4. The plaintiff cannot recover nominal damages, for he has no property in the letter. It is Mr. Green, the receiver's, property. The letter has no literary value. If it had, it has been given to

the world by the writer, and he has not secured its copyright.

5. The letter is a part of a judicial proceeding in the case of *Green vs. Waterhouse*, and no action is maintainable for such a publication.

6. The complaint contains no allegation of injury to plaintiff's business.

The publication may have been "officious, intermeddling and annoying," but these elements will not support an action. Nor if published with intent to injure.

7. The truth is a justification in a libel, though the motive be malicious.

Against these views the plaintiff's counsel urge:

1. In this case it is clear that the words of the letter were of and concerning the plaintiff personally in his business; and also that the "publication directly tends to injure the fame, reputation and good name of the plaintiff," within the statutory definition of a libel.

But the falseness of the letter is not to be averred, and therefore it is possible that the present case cannot be classified technically as an action for libel. But it comes within all the evils which actions for libel are meant to prevent. It contains all the legal ingredients of a tort, and is not *damnum absque injuria*.

2. The declaration conforms to our statutory form. It avers an intent to do the injury, and an unauthorized act done, whereby injury has resulted to the plaintiff's character, reputation and feelings, and the act is one which tends to injure the plaintiff's business.

3. The truth of the publication is not always a defense in a civil action.

4. Even Mr. Green would be liable for publishing over 100 copies. But it does not appear that he published any. Defendant's publication of the letter for a malevolent purpose was more than officious intermeddling with private affairs, it was a tort.

5. The receiver of a letter cannot publish it without leave of the sender. An injunction would issue to restrain such wrongful act. The amount of damage for the wrong committed is immaterial in this discussion.

6. The old theory for the necessity of averring special damages,

was that they were required to be averred, when not presumed, in order to prevent surprise to the defendant. But as proof of damage, where the words published are defamatory and actionable *per se*, would be no less a surprise ; it shows that the theory is not based on principle, and ought not to be adopted.

7. A publication may be true, and yet be a libel. To rake up a buried feud, to spread before the community a statement which was made by one of the parties to that feud, for the sole purpose of ending it, and to do so for the malicious purpose of injuring such person, and more especially when such publication necessarily tends to affect injuriously his business, reputation and feelings, is a wrong, and it would be a reproach to a system of law based solely on right reason, to say of such malicious injury that it has no remedy, unless its effect can be shown to have been to wring dollars out of the plaintiff.

8. Equity will restrain the unauthorized publication of private letters, on the ground of violation of confidence and injury to the feelings.

Cooley on Torts, pp. 356 to 359 ; Kerr on Injunctions, pp. 187 to 189 ; Pomeroy Eq. Jur., Sec. 1358 ; 2 Story Eq. Jur., Sections 946, 948.

BY THE COURT.

The first question to be decided is, whether this complaint is to be judged according to well settled rules concerning civil actions for libel. If it is, then it is clear that the demurrer must be sustained ; for the complaint does not aver that the words in the publication are defamatory. Moreover, they are not alleged to be false. A libel, according to our statutes, is a " publication in writing, print, or by picture, statue, sign or a representation other than by words merely spoken, which directly tend to injure the fame, reputation or good name of another person, and to bring him into disgrace, abhorrence, odium, hatred, contempt or ridicule, or cause him to be excluded from society."

It has been settled by a long course of legal decisions that defamatory words are those which produce any perceptible injury to the reputation of another. These, if false, are actionable, and general damages may be recovered of the person using them, without proof that any particular damage has followed their use.

It is also settled that the fact that the words employed by the defendant have perceptibly injured the plaintiff's reputation may be *presumed* from the nature of the words themselves. Also, if the words, being written and published or printed and published, are in any way disparaging to the plaintiff and tend to bring him into ridicule or contempt.

As above stated, the publication complained of is not alleged to be defamatory. It is therefore unnecessary to consider whether it has in fact that character. For this reason alone the plaintiff cannot recover general damages on his complaint, as for a libel. Nor can the plaintiff recover special damages, as for a libel, for he has failed to aver them in the particular manner required of the pleader in a libel suit.

I deem it unnecessary to discuss the question whether or not, considering our statute, the truth of the published matter is a complete defense to a civil action, for the complaint does not charge the matter published to be false, and it, purporting to be a copy of a letter written by the plaintiff himself, could not well be alleged to be false.

I pass now to consider whether the plaintiff has a cause of action in his case stated in the complaint, independently of the law governing libels.

This is a novel question and may be thus stated: A letter was written by a merchant in Honolulu twenty years ago as an apology and in order to settle and compromise a suit for slander. The letter was written to a person not the defendant, and closes with the statement: "I beg to enclose herewith a check for \$300 in your favor to pay the expenses you have already been put to in the suit against me, and also to pay for 100 printed copies of the apology should you desire to print the same, in order that you may have an opportunity, by circulating them, of repairing any injury you may have suffered by what I have said or done." Permission was thus accorded by the writer to the receiver of the letter to print 100 copies of the letter and to circulate them, presumably among those who might have been unfavorably affected toward the receiver by the plaintiff's statements.

The complaint charges that the publication of this letter by the defendants was with the intent to injure the character, feelings

and reputation of the plaintiff, and that it was done without the knowledge or consent of the receiver, Mr. W. L. Green, or of the plaintiff, and that the defendants wrongfully and injuriously printed and circulated a large number, that is to say several hundred copies, and delivered and distributed them to divers residents in Honolulu and other persons residing in this Kingdom.

In considering whether the plaintiff can recover damages for this conduct of the defendants, these allegations must be taken as true.

Judge Story discusses the question as to whether courts of equity ought to restrain by injunction the publication of mere private letters on business or on family concerns, or on matters of personal friendship and not strictly falling within the line of literary compositions. 2 Story, Eq. Jur., Sections 946 to 949. .

This learned jurist says in Sec. 946: "In a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is perhaps one of the most odious breaches of private correspondence, of social duty and of honorable feelings which can well be imagined. It strikes at the root of all that free and mutual interchange of advice, opinions and sentiments between relatives and friends and correspondents which is so essential to the well-being of society and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress from the public display of facts and circumstances which were reposed in the bosoms of others under the deepest and most affecting confidence that they should forever remain inviolable secrets."

Sec. 947. "It would be a sad reproach to English and American jurisprudence if courts of equity could not interpose in such cases, and if the rights of property of the writers should be deemed to exist only when the letters were literary compositions. If the mere sending of letters to third persons is not to be deemed, in cases of literary composition, a total abandonment of the rights of property by the sender, *a fortiori*, the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports, as matters of business, or friendship, or advice, or personal confidence, the implied or necessary intention of duty and secrecy."

Sec. 948. The author here says that private letters may be required to be produced for the purposes of public justice, and adds :
 * * * "But it by no means follows that private persons have a right to make such on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of gratifying a gross and diseased public curiosity by the circulation of private anecdotes, or family secrets, or personal concerns."

948 a. "But the utmost extent to which courts of equity have gone in restraining any publication by injunction has been upon the principle of protecting the rights of property in the books or letters sought to be published. They have never assumed, at least since the destruction of the Court of the Star Chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libelous character and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication. For matters of this sort do not properly fall within the jurisdiction of courts of equity to redress, but are cognizable in a civil or criminal suit at law."

Judge Cooley (Cooley on Torts, 358), in commenting upon a New York case, in which Chancellor Walworth held that he would not enjoin the publication of private letters unless they had a literary value (*Hoyt vs. Mackensie*, 3 Barb. Chan., 320), says: "It was also held that if the contents of the letter were such that it could not be supposed that the writer would consent to its publication, the conclusion must be that the letter has no value as a literary production. But this is a remarkable *non sequitur*, especially as in the very case in which the decision was made the defendant had published the plaintiff's letters, surreptitiously obtained, expecting to derive a profit therefrom." Mr. Justice Story has strongly contended for the jurisdiction of equity to restrain the publication of private letters on the ground of violation of confidence and injury to the feelings, and this seems the most reasonable doctrine, and it receives countenance from cases cited in the margin." Of these cases only one is accessible to me : *Eyre vs. Higbee*, 85 Barb., 502. This case decides that private

letters received by a person in his lifetime are not assets in the hands of his administrator and subject to sale to pay debts.

The receiver has only a qualified property in them. At the most he has only a joint property with the writer. As laid down by Lord Eldon in *Gee vs. Pritchard*, 2 Swanston, 402: "The property is qualified in some respects; that by sending the letter the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom it is addressed, yet that gift is so restrained that beyond the purposes for which the letter is sent the property is in the sender. Under such circumstances it is immaterial whether the intended publication is for the purpose of profit or not. If profit, the party is then selling, if not for profit, he is then giving that, a portion of which belongs to the writer."

This case is not accessible to me, but Judge Mullin, in *Eyre vs. Higbee*, in commenting upon it, says: "The English Court of Chancery has extended its protection, by means of injunction, over letters on matters of business or friendship, and for the reason that the writer has an interest in them, and it would not permit a breach of his confidence in allowing the publication."

Under these authorities the receiver of the letter in question would not be authorized to make publication of it to any extent greater than authorized by the writer.

A *fortiori* third parties, as these defendants are, have no such authority.

Even Judge Story, though finding that courts of equity would not exercise the injunctive power of the Court unless the letters were of literary value, says that these matters are "cognizable in a civil or criminal action at law." Vide *Supra*, Sec. 948 a.

In *Brandreth vs. Lane*, 8 Paige Ch. 23, Chancellor Walworth refused to restrain the publication of a libelous work, but left the plaintiff to his action at law.

In *Woolsey vs. Judd*, 4 Duer, 379, it is held that a court of equity cannot prevent the publication of private letters merely on the ground that such publication is injurious to the interests of society. It must stand on the ground that the writer has an exclusive property remaining in him, and the right to an injunction

does not depend upon the question whether the letter possesses value as a literary composition.

Wait's Digest, Title Injunction.

But Chancellor Kent, 2 Commentaries, 381, says: "The publication of private letters ought to be restrained when it would be a breach of confidence and trust, as letters of courtship, or *when injurious to the character or happiness of others.*"

In *Hopkinson vs. Lord Burghley*, 2 L. R. Ch. App. 448, Lord Cairns says: "The question in all these cases is, what was the purpose or object in the mind of the person sending the letter. The writer is supposed to intend that the receiver can use the letter for any lawful purpose, and it has been held that publication is not such a lawful purpose."

It seems to me that as the complaint avers that not only was an injury intended to plaintiff by defendants, but that one was done to the feelings, character and reputation of the plaintiff by the wrongful and injurious publication of this letter, this injury is not one that is without redress.

Upon principle, and I think upon sufficient authority—to-wit, Mr. Justice Story, Lord Cairns and Judge Cooley—the plaintiff ought to have the remedy for the wrong done him. Where there is a right there is a remedy. As Lord Holt has said: "It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." *Ashby vs. White*, Ld. Raymond, 938. 1 Smith's Leading Cases, 105. Here the plaintiff had been denied the right to vote for members of Parliament. "No such case," says Cooley, "had ever been adjudged and there was no precedent for the suit. But in the opinion of Lord Holt a precedent was not important; the material question was, had they a right to vote? When the facts were found in their favor, the legal conclusion must follow: Having a right, the remedy was of course."

In the case before me the wrong has been done, the letter has been published; it cannot now be restrained by injunction. To sustain this demurrer would be to hold that the defendants may continue to publish this letter from year to year, indefinitely, in all parts of the world, wherever the defendants may think it would damage the plaintiff. It would be a reproach to justice to say that

such conduct is remediless. The measure of damages is not raised by the demurrer. It is properly a matter of instruction to the jury.

I overrule the demurrer.

Honolulu, July 26, 1884.

HARRIET A. COLEMAN *vs.* CHARLES C. COLEMAN.

APPEAL FROM DECREE OF THE CHIEF JUSTICE GRANTING A
SEPARATION.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Voluntary gifts and assistance to the wife, from members of her own family, held not to be proof of the husband's failure to support her.

"Cruelty" defined and held not proven in this case.

Evans *vs.* Evans, 1 Hag. Con., 35 ; 4 Eng. Ecc., 310; followed.

Decree appealed from, reversed ; Judd, C. J., dissenting.

OPINION OF A MAJORITY OF THE COURT, JUDD, C. J., DIS-
SENTING.

THIS is a petition for separation, based on the two grounds of neglect to provide the petitioner with the necessities of life and of excessive and habitual ill-treatment.

The proofs respecting the first ground amount substantially to this, that the defendant's father-in-law had assisted him with capital, and had for a part of the time entertained the parties, with their young son, in his own house. This assistance was volunteered in a kind spirit by the father-in-law. He says: "They came by invitation. I thought his business was not very prosperous and that he was unable to furnish board and lodging for his family." There were also some presents of dress material made to the wife by members of the family returning from a visit abroad. But it does not appear that these volunteer acts of kindness on the part of the wife's family had become necessary to save

the wife from suffering, and that the husband would not have provided for her if they had not been offered. We consider that it would be unsafe to hold that the family of the wife could lay a ground for separation for non-support by gifts or hospitality offered the married daughter.

The case is chiefly pressed on the second ground—of excessive and habitual ill-treatment. We take the doctrine expressed by Lord Stowell, in the leading case of *Evans vs. Evans*, in these words: "What merely wounds the mental feelings is in few cases to be admitted where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

The evidence does not support, in our view, "an apprehended harm." The proceeding is in effect *quia timet*. It is for safety in the future, not retribution for the past. Bishop on Mar. and Div., 1, Sec. 719.

The evidence shows strong affection of the defendant for his wife and child. In the differences between them the wife, by her own testimony, has more often prevailed. There may be peculiarities or "difficulties" in the temper of the defendant; there may be incongruities or incompatibilities of disposition and habit between the parties; to such must be applied the words of Lord Stowell, in *Evans vs. Evans*, "under such misconduct of either of the parties—for it may exist on one side as well as on the other—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done both must suffer in silence."

We dismiss the complainant's bill and revoke the decree of separation for a year made by the Chief Justice.

A. S. Hartwell, for plaintiff.

C. W. Ashford, for defendant.

Honolulu, January 12, 1885.

J. R. SILVA *et al.* vs. A. J. LOPEZ *et al.*

APPEAL FROM DECISION OF AUSTIN, J.

OCTOBER TERM, 1884.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

On a bill to set aside a sale made under a power contained in a mortgage; held that a demand for payment of interest due, accompanied by threats to foreclose, is not equivalent to an entry, and there being no entry, as required by the power, the sale was invalid.

Where the mortgage required three weeks' notice of time and place of sale, a sale on the twentieth day after first publication of notice is invalid.

A sale in town of cattle running in the country, occasioning a sacrifice on account of purchasers not seeing the property, is a violation of duty of mortgagee to sell to the best advantage.

Decree affirmed.

OPINION OF THE COURT, BY McCULLY, J.

A BILL in equity is brought to set aside a sale made by the chief defendant as mortgagee, under a power of sale.

The argument before us was based on four objections to the validity of the sale, as follows:

"1. That as Lopez made no entry upon or demand for the possession of the mortgaged premises and chattels, he neglected the performance of a condition precedent.

"2. That the advertisement of sale by Lopez did not comply with the terms of the power.

"3. That the manner of conducting the sale, especially as regards the live stock, was grossly unfair to the mortgagors, and a breach of the implied condition that the sale should be conducted to the highest advantage of the mortgagors.

"4. That defendant Brown, having been attorney for the mortgagee, violated his duties as trustee for the mortgagors, by becoming a purchaser at the sale of divers lots of the mortgaged property."

The power of sale is in these terms : " Then the said party of the third part (Lopez), his executors, administrators or assigns, are hereby authorized and empowered to enter into and take possession of the property and chattels hereinbefore mentioned, and sell the same at public auction, first giving three weeks' notice in the English and Hawaiian languages, in two newspapers published and printed in Honolulu, of the time and place of such sale."

Default was made in the payment of the first installment of semi-annual interest due, and the defendant proceeded to foreclose the mortgage by public sale. The property consisted of sundry parcels of real estate, and chattels described as follows : " All that flock or herd of cattle and their increase running at large in Manoa Valley, or elsewhere on the Island of Oahu, and being in number one hundred head more or less and branded P x C, three bullock carts, eight yokes and thirteen chains, also fifty head of horses, mares and colts, more or less, and their increase, running at large in said Manoa or elsewhere, and branded P x C, also five horses in said Manoa and branded Ct, and also forty head of cattle, with their increase, branded Et, and running at large in said Manoa, or elsewhere on the Island of Oahu."

Mr. Justice Austin, by whom the case was heard in chambers, whence the appeal is to this Court, sustained the bill on the second and third points of controversy above stated, not sustaining it upon the first and fourth.

The first objection to the validity of the sale is that there was no entry upon or demand for the possession of the mortgaged premises and chattels.

To effect a valid sale under power, all the directions of the power must be complied with, says Wells, J., in *Cranston vs. Crane*, 97 Mass., 463, and this is unquestioned. The counsel for the defendants cite this case as overruling *Roarty vs. Mitchell*, 7 Gray, 243. We do not think it does upon the point at issue. The power contained in the first cited case authorized entry and sale on the premises, after notice given of the time and place, and the Court held that entry at the time of sale was sufficient. In *Roarty vs. Mitchell* the language of the power was that * * may enter and take possession of said premises, and may sell and

dispose of the same after notice, and the Court say "that it appears upon the agreed facts that no possession was taken of nor entry made upon the premises, nor was any demand for entry or possession made. We think such entry or possession or, what perhaps would be equivalent, a demand for possession and refusal, were conditions precedent without which no valid sale could be made under the power of sale in the deed." The language of the power in the case at bar corresponds with the above in requiring entry and possession, but not that the sale be held on the premises. Both cited cases require entry, with the suggestion in the latter that demand and refusal might be equivalent.

The proceedings upon sale of mortgaged property without suit are established by Chap. XXXIII. of the Acts of 1874. The Act provides that when a power of sale is contained in a mortgage, upon breach of the condition the mortgagee may give notice of his intention to foreclose by publication for three weeks before advertising the mortgaged property for sale, "and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage." He is, thirdly, to file with the Registrar of Conveyances, within thirty days after said copy of the notice of sale, an "affidavit that he has in all respects complied with the requisitions of the power of sale in relation to all things to be done by him before selling the property." The first requisition of the power of sale in this case was entry and possession. The parties having made this a condition precedent, are bound by it, without regard to any statute not requiring it; so, if it had been made a condition that the sale should be on the mortgaged premises, the statute not it requiring, this sale at any other place would not be valid. It cannot be considered that the statute requirement that three weeks' publication of intention to foreclose abrogates the condition precedent, if the parties have made it, that there shall be previous entry and possession taken. The statute provides that besides such notice of intention, the mortgagee shall also give such notices and do all such acts as are authorized or required by the power.

The evidence in this case is that the defendant mortgagee only demanded interest due, and threatened to foreclose. The threat to foreclose can only be considered a threat to take all the steps

required for legal foreclosure, among which was making entry. His demand for debt due cannot be considered an entry or taking possession. Upon this view we hold that the sale of the real estate was invalid upon the first ground of objection. How far this is applicable to the sale of the chattels will be considered in discussing the third objection.

In regard to the second objection, that the sale made on the twentieth day after the first publication of the notice was not in compliance with the condition in the mortgage of first giving three weeks' notice of the time and place of sale, we hold that not less than twenty-one days was requisite. The authorities which seem to support the defendants' position are applicable to cases where insertion of the notice is required to be a certain number of times in a weekly newspaper. They are otherwise when a publication is required for a certain period of time, as in this case, "after three weeks' notice," not after three consecutive weekly publications. For the full discussion and citation of authorities on this head we refer to the opinion of Mr. Justice Austin.

The learned Justice also sustains the bill on the third objection to the sale, as not being made in a fair and advantageous manner. This objection applies only to the sale of the chattels.

It will not be controverted that the law requires the mortgagee, in the exercise of his power, to use discretion in an intelligent and reasonable manner, not to oppress the debtor or to sacrifice his estate. Perry on Trusts, Sec. 602.

We must apply this principle to the facts and circumstances of every case.

This sale was held at an auction room in the city of Honolulu. So far as the real estate is concerned, we have no reason to believe that the sale in town was a disadvantage to the mortgagors. It is in accordance with a custom of long standing. It would be inconvenient and a disadvantage in many instances to conduct the sale of real estate on the premises, especially if there were sundry lots at some distance from town and from each other. Important sales and auction leases are made in Honolulu of estates situated in all parts of the Kingdom. And if the previous

notice is long enough, there are many good reasons to support this practice. Honolulu is the headquarters of capital and business. The Registry of Deeds, the Land Office and the Surveyor-General's Office are here. Surveys may be conveniently inspected and information obtained at the auction rooms or attorneys' offices during all the interval between advertisement and sale. We do not disapprove of the place of sale of the real estate in the present case.

The cattle, horses, carts, etc., remained as described in the mortgage quoted above, at the homestead, the premises being within three miles from town. They were advertised as 100 head of cattle, more or less, branded PxC, and running at Manoa, etc. It is testified by Mr. Castle: "There was no possibility of knowing what the stock was; no stock was presented. They were sold in lots of ten and perhaps (some) in lots of twenty. There was some controversy. I consider there was a sacrifice. The whole property was worth \$20,000." The plaintiff Silva says: "I had thirty good milch cows; \$45 is the lowest price for a good milch cow; none of the live stock was present at the sale; no measures were taken by defendant Lopez to drive them to the sale; I proposed to drive them to a pen; Lopez said, 'No.' The cows sold for \$20, with their calves. No description of the horses given at the sale. Two lots were sold of ten each, bringing \$100 and \$110 severally."

We might cite other evidence. It is convincing that there was a heavy sacrifice. Was it necessary? We think not.

It is said for defendant that the cattle could not have been driven to the auction room. That is true. Police regulations would not permit it; but they might and should have been collected on the mortgagors' premises. Intending bidders would not have been prevented from attending by the distance. It is true, as counsel says, there might have been a greater crowd attending at the sale in the auction room, but perhaps no greater number of bidders, and they it is who make a sale. The sale of the cattle, etc., could well have been on a different day, to permit a full attendance both at the real estate sale and the chattel sale.

The property should have been on view.

Roper on Judicial Sales, Sec. 1283; and the citation from *Herod*

vs. *Bartley*, 15 Ill., 58, Chief Justice Treat saying, "In the sale of personal property on execution, the property itself must be present. Bidders should have an opportunity of inspecting the goods and forming an estimate of their value. This is the only way to secure fairness and competition at public sales. It is necessary to protect the rights of both debtor and creditor. It should also be in the power of the officer to deliver the property forthwith to the purchaser."

Freeman on Executions, Sec. 290.

The mortgagee not only sold the chattels in lots, not on view, nor yet divided into lots, but without so much of an incentive to competition as would be given by a first, second or third choice of lots of classes or sorts, *e. g.*, the first choice of ten milch cows; although there is authority, *Waring vs. Loomis*, 4 Barb., 484, and good reason, to hold that a sale of a selection of, say thirteen, sheep out of twenty-one or twenty-two present, is void.

The rule of using every effort to sell to the best advantage will be applied with a consideration of the circumstances of the country. It might be allowed here to sell the remnant of a "brand," that is, all cattle or horses bearing the brand which could not with reasonable expense be found and captured, running semi-wild in the mountains.

In the case before us, it was reasonable to require that the chattels should be gathered on view at the mortgagee's premises, and sold with division and identification.

As such a taking possession was requisite for a proper sale, we need not consider whether, in a mortgage of chattels, it is necessary on breach to take possession, or whether the possession reverts to the mortgagee by force of law. The third objection is sustained.

Having found the sale invalid both as to the real estate and the chattels, it will not be necessary to discuss the fourth point.

As bearing upon all these points is the circumstance that the plaintiff Silva gave his consent to the sale as it was made. But in the present case it is not necessary to consider how far this cured objections and bars him from now claiming that the sale should be set aside, for he was not the sole mortgagor, and is not the sole plaintiff. The other mortgagors gave no consent. They

had an interest in the advantageous sale of Silva's estate and chattels, that they should realize enough to satisfy the debt and interest without necessity of selling the separate property of the co-mortgagors

The decree of the Court in Chambers is affirmed.

C. W. Ashford, for plaintiffs.

F. M. Hatch, for defendants.

Honolulu, December 10, 1884.

DECISION OF AUSTIN, J., APPEALED FROM.

This is an action brought to set aside a sale under a power in a mortgage of real and personal property, upon the ground that the sale was not advertised as required by the power, or initiated as provided by the mortgage, and was improperly conducted, and sales illegally made to different purchasers; and for an injunction against a further sale of part of the property mortgaged, and for relief in accordance with the facts alleged.

I shall first consider whether the sale was properly advertised under the power. The power provides that the sale shall be at public auction, "first giving three weeks' notice in the English and Hawaiian languages in two newspapers published and printed in Honolulu, of the time and place of such sale."

The undisputed fact is that the first advertisement was made in the *Hawaiian Gazette* of June 4th, Wednesday, announcing the sale for June 24th, Tuesday, the intervening time being only twenty days. The *Gazette* is a weekly newspaper published on Wednesday morning. The proofs show publications therein on June 4th, 11th and 18th only, before the sale.

Is this giving three weeks' notice in accordance with the power? Had the notice been of a sale upon Wednesday, June 25, 1884, this advertisement would have been sufficient in time, I think, though it would have been better to say June 26th; but as it was I think the advertisement was defective. I have examined with care the authorities cited by counsel on both sides, and I find none which would hold this advertisement to be enough. A distinction is made between statutes or powers requiring publication for a *certain period of time* and those requiring the insertion of the notice a *certain number of times* in a newspaper.

See Wade on the Law of Notice, Sec. 1077.

I think this distinction substantially explains and renders inapplicable the cases cited by the defendant's counsel.

Had the power required a notice published once a week for three successive weeks, what was done would have complied with it.

In *Alcott vs. Robinson*, 21 N. Y., 150, cited by defendant, there was a sale of real estate on execution under a statute which required "that the time and place of holding any sale of real estate on execution should be advertised previously for six weeks successively as follows: 1st, a written or printed notice shall be fastened up in three public places in the town where such real estate shall be sold; 2d, a copy of such notice shall be printed once in each week in a newspaper of such county if there be one."

In this case it was held sufficient to post a notice as required by the statute forty-two days previous to the sale, and publish a copy thereof in six successive numbers of a weekly newspaper, although the first publication be less than six weeks prior to the sale.

In *Priest vs. Tarlton*, 3 N. H., 93, cited by defendant, the holding is that "when a computation of time is to be made from the time of an act, the day when the act is done is to be included."

That was a case of the discharge of an insolvent debtor from imprisonment. The statute enacts that "said debtor may, at the expiration of fifteen days from the time of his commitment, apply to have said oath (for his discharge) administered to him."

Tarlton was committed on the 16th September, 1822, and in October, 1822, applied to take the oath. This was held sufficient, but the time intervening was fifteen days without counting the day the oath was applied to be taken.

In *Dexter vs. Shepard*, 117 Mass., 480, also cited by defendant the holding is that "the first publication of a notice of sale, under a mortgage power which requires the notice to be published once each week for three successive weeks, need not be made three weeks before the time appointed for the sale."

See also *Bachelor vs. Bachelor*, 1 Mass., 256, to a similar effect. In *Sheldon vs. Wright*, 7 Barb., 39, the statute required the order to be published four weeks successively in two or more newspapers, and it was held sufficient, though four weeks did not intervene between first publication and the day to show cause.

In *Swett vs. Sprague*, 55 Maine, 190, cited by defendant, a stat-

ute requiring publication three weeks successively in a certain newspaper, is complied with by three publications, though the time intervening between first publication and sale is not three weeks.

These are the strongest cases that have been found countenancing an intervening time of less than the whole period specified for notice.

These views are strongly combatted in several cases, and by three dissenting judges in *Alcott vs. Robinson*, 21 N. Y., 150, above cited; but if correct, they fail to sustain the publication in the case at bar.

In *Early vs. Doe*, in 16 How., 317, the Supreme Court of the United States holds that a notice of a tax sale, required to be advertised once in each week for twelve successive weeks, is not given unless the first notice preceded the sale eighty-four days.

See also *Ronkendorff vs. Taylor*, 4 Peters, 349; *Bunce vs. Reed*, 16 Barb., 347.

In *Howard vs. Hatch*, 29 Barb., 297, it is held that twelve successive weekly publications are sufficient, though less than eighty-four days intervene between the first and last, provided the sale is advertised to be at least eighty-four days after the first publication.

The rule of computation is to include the day of the first publication and exclude the day the act is advertised to be done.

See *Wade on the Law of Notice*, Sec. 1070. Publication for three calendar months was held accomplished by publishing first January 10th, and last April 9th. To the end of April 9th was just three months.

Id. Sec. 1071, 32 Cal., 347.

In *Townsend vs. Tullant*, 33 Cal. 45, the order for hearing in probate was required to be published for at least four successive weeks; twenty-six days only intervened and the notice was held insufficient.

In *People vs. Gray*, 10 Abb. Pr., 408, it is held that where notice is required to be published for ten weeks, seventy days must intervene. See also 1 Wend., 90.

In the light of these authorities, nearly all of which have been cited by the respective counsel, I feel that I must decide in this

case that the sale, under the power requiring the first giving three weeks' notice, requires three weeks to intervene between the first publication and the time of sale mentioned, and that the notice of sale was therefore insufficient; and, under all the authorities mentioned, if the notice is insufficient, the sale under it is void and not merely voidable.

See also Perry on Trusts, Sec. 602; *Bloom vs. Burdick*, 1 Hill, 130; *Sherwood vs. Reade*, 7 Hill, 431; *Shaber vs. Robinson*, 97 U. S., 68; Wade on Notice, Sec. 1105; Rorer on Judicial Sales, Sec. 99.

Second. If the advertisement were to be held sufficient, very serious objections are made to the method of conducting the sale of the live stock. They consisted of a promiscuous lot of cows, oxen and horses. The cows were sold in lots of twenty, the horses in lots of ten, and four oxen and one cart were sold together. The sale was at Adams' auction-room, in Honolulu; none of the property sold was present, but was at Manoa Valley, three miles away. No opportunity was given for inspection and the lots were not separated, but sold generally as lots of so many. Under such a method of sale they could not fail to be sacrificed, as was admitted on the stand by the attorney who conducted the sale. In fact, every sale of live stock made was shown to be a sacrifice. I do not think such a sale can stand.

No actual fraud is claimed, and it is the fact that the plaintiff, Silva, was present, and consented to the sale, and afterwards delivered stock under it, but manifestly he was a simple, ignorant man, and believed he was bound. Other mortgagors were not present, and are not bound by what Silva did, but I do not think he is estopped from now making the objection he makes herein.

The sale would seem to be void for uncertainty. Definite lots of particular animals were not sold, but general large lots. One lot of twenty cows, sold in form, were not found or delivered, in fact.

See *Waring vs. Loomis*, 4 Barb. 484.

In this case thirteen sheep were sold out of twenty-one or twenty-two present. On being asked which sheep he sold, the constable said "the best and fattest." All were driven away by purchaser, and selection made and the balance were driven back.

The sale was held void. The Court, Judge Marvin, says: It was the sale of a right to select out thirteen sheep from the flock; a constable has no power to make such a sale or contract. If the owner should make such a contract, no title would pass till selection was made—until then the contract would be executory. At a sale of personal property by a public officer, the property must be present, and it must be pointed out and specifically designated, so that the purchaser may know precisely what he purchases.

We think this reasoning is conclusive.

In New York State it is provided by statute that the goods and chattels sold shall be present, and pointed out to the inspection and examination of bidders.

But before any statute, and at common law, such a sale was held void.

See *Sheldon vs. Soper*, 14 Johns. 352; *Jackson vs. Striker*, 1 Johns. Cases, 284.

Freeman on Executions, Section 290.

For this reason also, as well as for the defects in the notice of the sale, I think the sale must be held void.

Third. The regularity of the sale was further objected to on two grounds; first, that the mortgage provides that upon failure to pay, the mortgagee is authorized and empowered to enter into and take possession of the property and chattels mortgaged, and that this was not done; and, second, that Mr. Brown, the plaintiffs' solicitor, bought several lots of the property sold, which he was unauthorized to do by law.

As to the point that no entry was made before sale, I think enough was done to authorize the advertisement for a sale. The interest due was demanded, and a threat made of sale under the power, unless payment was made.

The mortgagee continued to neglect to pay. To enter and take actual possession of the stock till immediately before the time of the sale, would have been inconvenient and expensive. The power does not in terms require, it only "authorizes and empowers," entry to be made.

Upon the point that the solicitor of the mortgagee bought some of the property sold, the authorities cited by plaintiffs' counsel seem strong, but I am inclined to doubt the wisdom of the rule.

Provided the sale be fairly conducted, I do not see that injury can arise by allowing the mortgagee or his solicitor to buy. The mortgagee is interested at least to bid up to the amount of his mortgage. At most the sale would be voidable, and if at fair prices, and some time passed before objection was made, certainly the sale should stand.

But for the reasons first and second above given, the sale must be set aside, and the conveyances made thereunder must be cancelled.

There are several purchasers upon whom this decree will operate as a hardship. They, however, have no remedy against the plaintiffs because thereof. Some of the animals bought are shown to have been resold by the purchasers. The animals still remaining must be given up to the plaintiffs, and those not forthcoming must be accounted for by the purchasers on reasonable terms, and proofs relative to the same, and the values, and also the expenses of returning the animals returned, may be taken before the clerk, and on his report an equitable decree will be made in regard thereto.

A computation may also be made by the Clerk of the amount due on the mortgage, to the end that the plaintiffs may pay the same in full.

Upon presentation, a proper decree will be signed under this decision.

Honolulu, October 9, 1884.

See same case *post*.

OPINION ON THE CURRENCY.

OPINION OF THE JUSTICES OF THE SUPREME COURT TO THE
GOVERNMENT, UNDER ARTICLE 70 OF THE CONSTITU-
TION, ON THE ACT TO REGULATE THE CURRENCY.

DECEMBER, 1884.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

The Minister of Finance may substitute United States gold coin for
Hawaiian silver, under Chap. VIII., Laws of 1884.

LETTER FROM THE ATTORNEY-GENERAL.

*To the Hons. A. F. Judd, B. H. Austin and L. McCully, Chief
Justice and Associate Justices of the Supreme Court:*

On behalf of the Government, I respectfully submit to you the
question herein following, and beg that you will favor me with
your opinion on the point.

The fourth section of Chapter VIII. of the Session Laws of
1884 reads as follows:

"Whenever it shall appear that there is such an excess of
silver coins in circulation as disturbs the equilibrium between
gold and silver coins, under the provisions of this Act, the Min-
ister of Finance, in order to restore such equilibrium, shall
replace sufficient silver coin from any silver coin which may be in
the Treasury, either as Government realization or on deposit on
account of any silver certificates, with gold coins of the United
States, in the same manner as hereinafter provided in Sections
5, 6 and 7 of this Act."

Under Section 5 of the same Act, the Minister of Finance
is authorized to substitute gold coin for all silver coin, *except
Hawaiian silver coin.*

Does the last sentence in Section 4, wherein the Minister is
directed to carry out the provisions in the same manner as is pro-
vided in Section 5, forbid or permit the substitution of United
States gold coin for Hawaiian silver?

I have the honor to be your obedient servant,

PAUL NEUMANN, Attorney-General.

Honolulu, December 10, 1884.

JUDICIARY DEPARTMENT,

HONOLULU, December 11, 1884.

To His Excellency Paul Neumann, Attorney-General:

SIR: The Justices of the Supreme Court had the honor yesterday to receive from you a communication wherein our opinion is asked on a question arising upon the "Act to regulate the Currency," passed by the Legislature of 1884.

Assuming that the request emanates from His Majesty's Cabinet, we proceed to answer the question stated, which is, in short, whether the fourth Section of the Act is in conflict with Section 5, or as you have stated it, "Does the last sentence in Section 4, wherein the Minister is directed to carry out the provisions in the same manner as is provided in Section 5, forbid or permit the substitution of United States gold coin for Hawaiian silver?"

In order to understand and properly solve the question presented, the nature of the money in circulation in this Kingdom at the time the Act was passed must be understood. It consisted of silver coins of Mexico, France, the United States, and of many other nations, as well as of a large amount of Hawaiian silver coin recently introduced.

Looking at the Act as a whole, the design of the law is apparent. It was to make United States gold the circulating medium of this country.

Section 1 prescribes that United States gold coin shall be the standard and legal tender for the payment of all debts in this Kingdom.

Section 2 allows the silver coin of the United States and of the Hawaiian Kingdom to be legal tender for any amount not exceeding ten dollars in any one payment.

By Section 3 *all other* gold and silver coins are receivable at the Government Treasury in payment of Government dues, duties and taxes at a rate not exceeding their bullion value, and could be disposed of at a discount by persons holding them and having dues to pay to the Government.

The next five Sections of the Act provide for two methods by which the silver in circulation was to be reduced in volume and replaced with United States gold.

In the first place, by force of the first part of Section 5, imme-

diately on the approval of this Act—that is, from and after the 17th day of July, before the 1st of December, the time when the Act in other respects went into effect—the Minister of Finance was required to exchange, during sixty days after a notice to this purport, silver coins of all nationalities excepting those of the United States and of Hawaii, for Hawaiian coin, dollar for dollar. If the entire public had availed itself of this provision, it is apparent that all the heterogeneous silver in circulation would have flowed into the Treasury, and no silver coins remained in circulation but those of the United States and of Hawaii. This action was required to be taken immediately on the passage of the Act.

The last part of Section 5 requires the Minister of Finance to arrange for the sale of the heterogeneous silver thus received and all silver coins then in the Treasury, except Hawaiian coins, and the delivery of their proceeds into the Treasury—gold coins of the United States.

Section 6 makes further provision to enable persons, whose tenders for the purchase of the silver coins mentioned in Section 5 were accepted, to deposit bonds as security for the delivery of the gold proceeds of the sale. Section 7 enacts that the loss incident to the conversion of silver into gold shall be borne by the Treasury.

Now, Section 4, although appearing in the Act earlier than Sections 5 and 6, would become operative after the act of calling in the heterogeneous silver had been accomplished, and might naturally have come later in the Act than Sections 5 and 6. But we presume it was placed thus early in the Act, as it has a permanent force and effect. It reads as follows:

“Whenever it shall appear that there is such an excess of silver coins in circulation as disturbs the equilibrium between gold and silver coins under the provisions of this Act, the Minister of Finance, in order to restore such equilibrium, shall replace sufficient silver coin from any silver coin which may be in the Treasury, as Government realization or on deposit on account of any silver certificates, with gold coins of the United States in the same manner as hereafter provided in Sections 5, 6 and 7 of this Act.”

To state it more fully: Whenever (that is, at any time in the future) it shall appear that there is such an excess of silver coin in

circulation (that is, in general circulation in the community) as disturbs the equilibrium between gold and silver coins under the provisions of this Act (that is, whenever there is more silver in circulation than will suffice for the payment of debts of ten dollars or less in amount), the Minister of Finance is required to replace silver coin in the Treasury sufficient in amount to restore the equilibrium, (whether this silver coin lies in the Treasury as the general funds of the Government or is there on deposit to meet silver certificates) with gold coin of the United States. The Act also says that the method in effecting this is to be that prescribed in Sections 5, 6 and 7 of the Act. That is to say, the Minister of Finance must arrange through advertisements for tenders for the sale of this silver coin in lots of not more than \$50,000 each. It is to be noticed that Sec. 4 confers a power to replace silver coins with gold coins, which is to be invoked at any time in the future, and as often as the contingency of a redundancy of silver in circulation shall arise.

It is also plain that by the terms of this section the nature or nationality of the silver coin which must be replaced with gold is not specified.

The section speaks of it as "any silver coin," also as "coin on deposit on account of any silver certificates," and Hawaiian silver coins are not excepted from the operation of the authority to convert. In reason there could be no distinction made, the evil to be remedied being an excess of silver coin.

In order to avoid in this section a repetition of the manner in which this replacing of silver with gold is to be done, the Act says briefly that the Minister shall conduct this replacement "in the same manner as hereinafter provided in Sections 5, 6 and 7 of this Act." But as we have above suggested, this requires merely that the *modus operandi* shall be the same as that pursued in replacing the silver required to be replaced by Sec. 5, and does not require that the subject matter—*i. e.*, the silver coins—upon which this method of exchange is to be pursued shall be identical with that mentioned in Sec. 6.

We find no contradiction in these sections and are of the opinion that Sec. 4 of the Act permits the Minister of Finance to substitute United States gold coin for Hawaiian silver coin, and

requires him to do so whenever the contingency of an excess of silver shall arise.

In examining the statute for the purpose of answering the question submitted by His Majesty's Government, we have observed a possible danger in the conversion of Hawaiian silver into American gold. This coin for conversion into gold is worth only its bullion value. The intendment is that it shall be taken to San Francisco and melted. But we see nothing in the statute to prevent a purchaser of this coin at, say 80 per cent., from putting it into circulation here if he can obtain his gold otherwise to pay for it.

We trust that our sense of this danger will be considered a justification for going beyond the subject matter of the letter and offering a suggestion. It seems to us that the Minister of Finance should make the sales of coin under conditions which will effectually prevent such treatment of the coin sold.

We have the honor to be your obedient servants,

(Signed)

A. FRANCIS JUDD,
LAWRENCE McCULLY,
BENJAMIN H. AUSTIN,
Justices of the Supreme Court.

H. TURTON vs. J. M. KAFENA, Minister of Finance.

SUBMISSION ON AGREED STATEMENT.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Where the Tax Assessor added to the valuation of plaintiff's property the amount of two mortgages on the property; held clearly an error, under Sec. 24, Chap. XLIII. Laws of 1882.

By referring to the agreed statement of facts, and the exhibit annexed, it appears that the Assessor added to the valuation of the several items of plaintiff's estate the amount of two mort-

gages upon the property described in the assessment. This is clearly an error, and could only have been made by a singular misunderstanding of the language of Sec. 24 of the general tax act, Chap. XLIII. of the Laws of 1882, found at page 121 of the Compiled Laws, which is as follows: "In respect of the amount of the money due on such mortgage, he shall pay the tax thereon, which payment shall be deemed to be a payment made by the mortgagor to the mortgagee on account of interest, or of principal and interest, as the case may be, and all money so paid by a mortgagor shall be allowed for in the accounts between the mortgagor and the mortgagee."

The intent of this section is that the tax upon property shall be paid in full by the owner thereof, without deduction, as to the Government, for the amount of the mortgage upon it, the mortgagor thereafter deducting the amount which he has paid for account of the mortgagee.

Let judgment be entered for the plaintiff.

E. Preston, for plaintiff.

Attorney-General, for defendant.

Honolulu, January 6, 1885.

In the matter of J. W. KELIIKOA and J. H. BARENABA,
Attorneys-at-Law.

COMPLAINT FOR MALPRACTICE.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Malpractice of certain attorneys reviewed and punished.

OPINION OF THE COURT, BY McCULLY, J.

THE above named persons are licensed as attorneys under the provisions of the statute for licensing to practice in the police and district courts only, and for the limit of two years. Compiled Laws, p. 314. The Attorney-General cites them to respond to a

complaint for conduct contrary to their duties as licensed attorneys.

Upon the evidence, it appears that one Kaulahea, who may be termed the complainant in the case, had been arrested upon the charge of his wife for deserting her, and was confined at the station house pending trial. Kaulahea testifies that he is eighteen years of age. There is nothing in his appearance to indicate that he is not nearly correct in this statement. He says that while in a station house cell, Keliikoa presented himself at the bars and solicited him to employ him as a lawyer for his defense, but that he declined to do so. Keliikoa testified that he accepted, or requested him, on a promise to pay him \$25 "if he got clear." Frank Metcalf, who was present, corroborates the testimony of the latter.

Kaulahea was brought before the Police Court on Monday, December 8th, and, by remand, Wednesday, December 10th, meanwhile being detained in the station house. The Police Justice testifies that his record does not show that any person appeared as attorney, and his recollection is that no one did so appear, and he recollects that Keliikoa and Barenaba were sitting in court, as is in a measure customary with them, but did not hold themselves out as counsel in this case. Barenaba testifies that he became concerned in the case by request of Keliikoa, who wished him to assist, and promised or gave him the expectation of some fee. He says he had had no interview with Kaulahea before the trial. Barenaba testifies that in the Police Court he "saw that Kaulahea was stupid (hupo), so I got up and stated to the Court what I knew about Kaulahea's stupidity. There were no witnesses for or against Kaulahea. Keliikoa did nothing in Court but start to get up and sat down again, leaving me or asking me to speak." It does not appear by the testimony and record of the Police Justice that Barenaba was witness or spokesman in any capacity.

What was the case on which Kaulahea was confined and brought before the Court? The somewhat peculiar statute of June 17, 1862, with its amendments, now constituting Chap. 61 of the Penal Code, provides that a husband or a wife may, upon sworn complaint, procure a warrant for the arrest of the other having

deserted; that the Justice shall examine the difficulty, secure a reconciliation and promise to return, if practicable, in that case imposing no penalty. The Police Justice proceeded upon this law. No witnesses were called. He discovered that the difficulty on the part of the wife and her father was that the husband was not in receipt of income, and did not supply money. It also appeared to the Police Justice that the wife had a particular friend in a Chinaman who accompanied her. The husband either had not deserted his wife, or if he had, he consented before the Magistrate to return to her. Under the law, then, he should be discharged (for a first offense), and he was discharged, the Magistrate, who by the act is made an adviser, recommending that he seek and obtain employment.

Thus it appears that this was not a case needing the assistance of counsel, and that these attorneys gave no assistance, either in Court or out, for Barenaba's statement, if he did make one, was not the act of an attorney, but of an acquaintance, and the Police Justice did not need to be told that the defendant was stupid, for he says that he showed that before him, and we cannot take much account of the testimony of Keliikoa that it was in consequence of his advice to the defendant that he consented to return to his wife, as Keliikoa did not appear as his counsel, and it is not shown that he assisted in any manner in the matter for which he was charged.

When Kaulahea was discharged, he seems to have been taken in hand by Keliikoa and Barenaba. He had an interview in a private room with Keliikoa. He testifies that Keliikoa said to him, "You had better ship," that is, engage as a contract laborer; that if he did not ship he would have him arrested as a vagrant, and he might be imprisoned for five years. Keliikoa denies this, and the story lies between the two. Then Barenaba took him, as he says, by direction of Keliikoa, to a native runner by the name of J. K. Spalding, and the party, which Keliikoa and another had joined, went to the office of ———, agents for the ——— plantation, at Kauai, where Kaulahea "shipped" upon a contract for two years' service, receiving a cash advance of \$60. (By Act of 1882, Chap. XXXIII. found in the Compiled

Laws, p. 459, no contract for labor over one year can be penally enforced if more than \$25 advance is paid).

Without more detail it may be said that this not very bright young man continued beset by these friends and advisers till he had paid Keliikoa \$25 and Barenaba \$10 (though he admits only \$5) for legal assistance, "depositing" \$10 with the runner Spalding, for security that he should be on hand to go by steamer to Kauai, and \$5 to him as "a gift," leaving himself \$10 with which to meet his own requirements, and alleviate the difficulty with his wife, by which he had got into this trouble, and as his wages were at \$15 per month, he thus anticipated four months' income for this net result, so that the assistance of his legal friends out of Court placed him in a position of far greater difficulty than he was in when confined in the station house. If in Court they gave him no professional help, doing nothing, out of Court they effectively and actively injured him.

Keliikoa further informs us that of his fee of \$25 he paid \$5 to Kauhane, an officer in charge at the station house, who had stated to him that Kaulahea wanted counsel, and had admitted him to the door of his cell. This circumstance we have remitted to the attention of the Marshal. It cannot be permitted that police officers shall be brokers or partners in attorneys' business.

Keliikoa and Barenaba have, by their own testimony, placed themselves in a most discreditable position. Taking the testimony of Kaulahea, of which we have quoted a part only, their conduct is still worse. They have used their licenses to injure the complainant. The whole course of their proceedings has been not to assist him in any manner, but to extort money from him for themselves.

It is not the intention of the law for licensing attorneys that they should have a special opportunity to plunder the ignorant and the timid. An attorney's license is granted on the theory that the licensee is competent to give assistance to clients and to the courts, and that he is of honest and honorable character. No precise lines can be laid down for the conduct of attorneys. Every case must be dealt with according to its own circumstances. The respondents herein have been guilty of conduct which violates their obligations as attorneys. We make some distinction

between them, deeming Keliikoa to be guilty of gross misconduct, and the principal actor and offender in this affair. We adjudge that his license be cancelled, and that he pay into Court the \$25 received by him, to be held for Kaulahea, subject to the claim of the party who shipped him, if it shall appear that his contract is rescinded as being a minor or for the excessive advance.

Barenaba we suspend from practice for three months, and order that he pay into Court \$5, subject to the same disposition with the above.

Antone Rosa, for the prosecution.

Holokahiki and *Poepoe*, for the defense.

Honolulu, January 20, 1885.

In the Matter of H. N. KAHULU, District Judge of Ewa, Oahu.

COMPLAINT FOR MALFEASANCE.

JANUARY TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Alleged malfeasance of a District Judge reviewed.

OPINION OF THE COURT, BY McCULLY, J.

INFORMATION by the Attorney-General charging that the above-named officer "has committed offenses in his official capacity, such as render him totally unfit to hold the position of District Justice as aforesaid." The specific charges are of corruptly demanding and receiving \$12.50 from a plaintiff for whom he had rendered a judgment for \$200, and for refusing to return \$4, deposited with him for an action which was never brought. Also for repeated and long-continued absences from his district for periods of three successive weeks at various times, whereby it was rendered impracticable to bring civil or criminal business before him; and generally for willful neglect, incompetency and unfitness to hold the office. This proceeding is had by authority of amended Sec.

914, page 267, Compiled Laws, and the prayer of the complaint is that the Magistrate be dismissed from office.

In respect to the first charge the respondent offers his own testimony and that of J. M. Poepoe, Esq., an attorney-at-law, to show that this amount, which equals the attorneys' commissions as taxed by law in assumpsit, was demanded and received by Poepoe from the plaintiff, anticipating its collection from the defendant. It was ill advised of the magistrate to concern himself between attorney and client in demanding or collecting fees. His name is attached to the receipt as if he had received this sum, and he went to plaintiff's store to ask or demand it. We give him the benefit of his evidence and find him guilty only of gross indiscretion and not of fraud.

Respecting the item of four dollars, received as costs, the defendant claims that two dollars of it was required for execution (perhaps on the judgment for \$200, as the case was for the same plaintiff), and that he told the plaintiff he would pay him the remaining two dollars, but that his money was all at Ewa, and the demand was made on him in Honolulu. This appears to us to be an evasion.

We have examined the plaintiff's accounts at large and called on him to explain various discrepancies appearing in them and further appearing by comparison with accounts kept by the Deputy Sheriff. His explanations are evasive and unsatisfactory. His method of keeping accounts is such that fraud cannot be detected. He fails to make entries of cases where costs are received and the case may be withdrawn by settlement out of Court. We are unable to understand the course of his receipts from the beginning up to his return to the Public Auditor. In respect to a fraudulent detention of any money we are left in doubt, and we may say unfavorable doubt, but cannot affirm that any item of fraud is proved.

In regard to the charge of absence from his district to such an extent as to impair the right of the community of that district to have a Court for civil and criminal business, we find it to be well sustained by proofs. The respondent's own admissions go far toward supporting the charge. He says he could not procure a dwelling in the district until lately. We cannot admit his excuse

as sufficient for the long continuous absences. He was bound, by accepting office, to be in his district at least on stated days of each week at some known, and, if possible, convenient locality. But he is further shown to have failed to attend at the day appointed for trials, whereby numbers of persons were kept waiting for him till afternoon and left the place without doing their business.

It was also made to appear that he charged unusual and inadmissible items as costs, charging ten cents for the blanks used for subpoenas, summons, etc., and in the case of delinquent taxpayers charging one dollar in the nature of commissions.

From this sketch it appears that there are many delinquencies and errors of this magistrate to be condemned.

It is possible to take a charitable view of his conduct and to find that he is not guilty of fraud or of willful neglect of duty. He has but two months now remaining of his term of two years. There can be no judgment of suspension from office, for the law does not provide for it, moreover the office cannot be left vacant. In view of the brief time remaining, and of the consideration that the examination now had with the instruction and censure of the Court upon the irregularities and deficiencies discovered, may correct the irregularities of his administration; we are of opinion that the public service will not suffer by allowing the respondent to continue in office till April, when his commission expires, leaving it then to the appointing power to consider, upon his past record and his conduct during the remaining time, whether it will be advisable to renew his commission.

Antone Rosa, for the complainant.

J. M. Poepoe and *W. L. Holokahiki*, for the respondent.

Honolulu, January 26, 1885.

M. DE GONVEIA *vs.* L. LOKA.

EXCEPTIONS TO FINDINGS OF JUDD, C. J.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

In a hearing before Fence Commissioners to assess amount to be paid by a person who has neglected to comply with an order to fence, such person must have notice to attend. In the absence of such notice, an order of the Commissioners held to be invalid.

Decision of the Chief Justice affirmed.

OPINION BY McCULLY, J.

THE plaintiff brings a bill of exceptions to the finding and the law in this case, tried by the Chief Justice, the jury being waived.

The plaintiff's action was to recover \$244 37, the amount of assessment in his favor against the defendant, made by the Fence Commissioners of North Kona, Hawaii. Under the Act to Promote Fencing, of 1859, found on page 497, Compiled Laws, the Commissioners of Fences have jurisdiction, *first*, to determine, after public notice given, "the kind of fence to be built by the owners of adjoining lands, and the share which each owner shall build or maintain, designating the time within which the work shall be done;" and, *secondly*, "in case one party shall have refused or neglected to build or maintain the portion of any fence assigned to him by the Commissioners, and the same has been done by the aggrieved party, the Commissioners may assess the amount due for such holding, a certified copy of which assessment, filed with a District Justice of the District, shall entitle the party to judgment and execution for the amount assessed, as in civil suits."

The defense made in this action is that the defendant received no notice to attend at the second proceeding, namely, the assessment of expenses against him. It is claimed that the notice given in the first proceeding was sufficient, and that he must be

held as being *in curia* for all further proceedings in the same matter. This is unreasonable. It might be impossible for him to ascertain by observation the time and place when the Commissioners might consider and make their assessment. They keep no office, have no clerk; they may make their assessment at any time after the term prescribed and after the other party may have built it for him. The defendant has a right to be heard upon the question of the actual, reasonable or necessary expense of building the fence, as it has been built. This is a separate and distinct proceeding. It is one thing to be ordered to build or maintain a certain amount and description of fence, within a certain time, with no ascertained equivalent or alternative in a money amount, and another thing to determine what sum the defendant shall pay another party who has built it. The defendant has an interest, and therefore rights in the finding of the amount. It is not to be awarded on the plaintiff's bill *ex parte*, and without opportunity for the defendant to be heard. Having rights, he must have notice when they are to be adjudicated. It is immaterial that this statute does not prescribe that a notice shall be given. This is a fundamental principle in all judicial proceedings: *Audi alteram partem*.

The proceedings for assessment by the Commissioners must be held to be fatally affected and their finding void.

Exceptions overruled.

Cecil Brown for plaintiff.

No appearance for defendant.

Honolulu, February 13, 1885.

ESTATE OF BERNICE PAUAHI BISHOP.

APPEAL FROM ORDER OF McCULLY, J., ADMITTING WILL TO
PROBATE.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

An appellant from an order admitting a will to probate must show *prima facie* that he is an heir-at-law of the decedent.

A third cousin cannot inherit under our statute.

The Supreme Court has power, by statute, to make rules, and its rules, made pursuant to statute, are law.

An appellant, who has lost the right of appeal, cannot transfer it to another.

OPINION OF THE COURT, BY JUDD, C. J.

The will of the late High Chiefess Bernice Pauahi Bishop was duly admitted to probate on the 2d day of December, A. D. 1884, before Mr. Justice McCully. At the hearing one P. F. Koakanu appeared personally, and stated that he was an heir-at-law of the decedent, and desired to contest the will. He did not offer to establish his relationship, and he did not offer any evidence against the admission of the will to probate, nor did he cross-examine the witnesses examined by the proponents.

On the 12th day of December, however, he took the steps necessary to an appeal from the order of probate to the Supreme Court, and the cause was placed on the calendar for the January term. The case was called and continued several times at his request, and finally, on January 30, 1885, the last day but one of the term, he appeared by his counsel, M. Thompson and G. B. Kalaaaukane, Esqs., and desired a further delay, in order to prepare his case. This not being deemed reasonable by the Court, he presented his case and the Court dismissed the appeal, but allowed him ten days to come in with a motion to reinstate the appeal upon affidavits showing that the contestant had a standing in Court. We do not here give the grounds on which

the appeal was dismissed, in order to avoid a repetition of what will appear later.

The affidavits and motion were duly filed, and argument was had thereon on the 13th of February before the full Court.

The affidavit of the contestant shows himself to be, as stated at the first hearing, a great-great-grandson of Kamehamehanui (not Kamehameha I.), who was also the great-grandfather of the decedent. This would make contestant a remote cousin, or, in common parlance, a third cousin of the decedent.

The law regulating appeals in probate cases (Compiled Laws, p. 394) allows a person claiming before the Probate Judge the estate, or any part thereof, or any interest therein, by virtue of the statutes of descent of property in this Kingdom, to move the appellate Court, if any matter of fact is in issue, that the issue may be tried before a jury, and such motion is not to be denied.

We think it is not necessary to adduce authorities in support of the proposition that the person desiring to appeal against the decision of the Probate Court, admitting the will to probate, must claim and prove, *prima facie* at least, that he is an heir-at-law of the decedent, and would inherit the property involved, or some interest in it, if the will should finally be refused probate. A case has been shown us by counsel for the proponents which sustains this view: *Taff vs. Hosmer*, 17 Mich. 248, holding that "No one can contest a will which only disposes of property, except the heir-at-law, or next of kin of the testator."

Estate of Schroeder, 46 Cal. 305: "One who does not claim any interest in real estate cannot contest an order of sale from Probate Court."

By repeated decisions of this Court, the inheritance of collaterals terminates, under the statute of descent, with the brothers and sisters of the parents of the intestate and their direct descendants.

Makea vs. Nalua, 4 Haw. 221; *Kahiuka vs. Hobron*, *id.* 227.

This would exclude the relationship of third cousin.

But if the will had been for any cause not admitted to probate, the contestant would not inherit, for the decedent left a

husband, who would inherit one-half the property, and the other half would, according to the contestant's genealogical tree presented, go to Kalola, a half-cousin. On his own genealogy, therefore, the contestant has no standing in Court.

But he presented to the Court a deed dated 22d December, 1884, wherein for the consideration of one dollar and natural affection, Kalola, claiming to be a half-cousin of the decedent, conveys to contestant all her right, title and interest in the estate of decedent. No question is made as to the right of an heir to assign his possibility of inheritance. The will was admitted to probate December 2d, and the deed was made twenty days after.

By Rule IV. an appeal from a Justice of the Supreme Court in probate must be taken within ten days from the rendition of the decision. As the authority of the Court to make this rule has been challenged, it becomes necessary to cite Section 1015 of the Civil Code: "The Supreme Court may, from time to time, establish by standing rules, such regulations for the taking of appeals, etc., as the said Court may deem necessary for the better administration of justice." Also, Section 833: "The Supreme Court shall have power, from time to time, to make rules regulating the practice and conducting the business of said Court, in all cases not expressly provided for by law; and thereafter to revise said rules, so often as it may be found wise and necessary to simplify said practice, and remedy any abuses or imperfections that may be found to exist therein."

"A rule of Court, made in pursuance of a statute, has the force of law." *Paakuku vs. Komoikehuehu*, 3 Hawn. 642. This is law universally.

Kalolo took no appeal from the decision of the Court admitting the will to probate. She then, by not exercising the right of appeal within ten days, had irrevocably lost it at the time she made the conveyance of her interest to the contestant, and it is too plain to require argument that if she had no right of appeal, she could not transfer such a right to the contestant. Her deed does not clothe her grantee with a power that she did not herself possess.

The affidavits presented for the purpose of showing that contestant has reasonable grounds for attacking the will, consist of

statements that the deponents heard from persons whose names they do not undertake to give, that something was wrong with the will. We fail to find one positive statement of a fact which would tend to disturb the probate of the will. These affidavits cannot be considered as affording any foundation for the motion to reinstate the appeal. Moreover, the affidavits are mainly directed against the codicils, which vary some bequests only, and do not change the general current of the disposition of the property. These were made on the 4th and 9th of October, respectively, and the testatrix died on the 16th. But her will was made on the 31st October, 1883—a year before the death of the testatrix.

We find no ground for disturbing the order made on the 30th of January last, and the contestant's motion is denied, with costs.

F. M. Hatch, for proponents.

M. Thompson and *G. B. Kalaaukane*, for contestant.

Honolulu, February 18, 1885.

AH CHU *vs.* SUNG KWONG WO CO.

EXCEPTIONS FROM RULINGS OF McCULLY, J.

JANUARY TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

There is no time limited within which a bill of exceptions, from an order denying motion for new trial, must be presented.

A bill of exceptions, referring to the Judge's minutes for the evidence, though informal, is not improper.

Exceptions can be taken from an order refusing a new trial.

OPINION OF THE COURT, BY AUSTIN, J.

A verdict against the defendants was rendered by the jury at the October term, 1884. Exception was duly noted at the time, and an informal motion for a new trial was made before Mr. Justice McCully, and his decision denying the motion was filed De-

ember 24, 1884. On December 26, 1884, notice of appeal from that decision was noted, and on January 16, 1885, the defendant tenders to Justice McCully for settlement a proposed bill of exceptions which he refused to sign. The exceptions are objected to as not presented in time.

In *Kamalu vs. Lovell*, 4 Hawn., 601, we held that the informal motion above referred to might be made without a bill of exceptions allowed, but if the party beaten on that motion sought to go farther, he must draft and present a bill of exceptions. The opinion fails to say when this should be done. Sections 831 to 839 and 1155 and 1156 of the Civil Code, which are the only ones which can affect the question, fail directly to speak of this second motion now sought to be made.

This defect ought to have been remedied by a direct rule of the Court. In the absence of such a rule we feel obliged to hold upon the statute that the exceptions were presented in time.

Another question raised is that the bill of exceptions did not contain the evidence. The bill filed refers to the Judge's minutes below and asks that they may be made part of it. Upon these his decision was based, and, though informal, we shall hold it enough in this case, but they must be copied and annexed to the bill.

Another point is made that the judge below denied the motion for new trial, and that this cannot be appealed from in this case because his decision was discretionary. The motion below was on two grounds: 1st, that the verdict was against evidence; 2d, that the damages were excessive. Under the usual practice in this Court, we think such exceptions can be taken.

The exceptions were well taken and may be placed on the calendar for argument at the next term.

A. S. Hartwell, for plaintiff.

W. R. Castle, for defendants.

Honolulu, February 26, 1885.

See new Rule VIII.

KAWIKA *et al.* vs. PAKEOKEO.

APPEAL FROM COMMISSIONERS OF PRIVATE WAYS.

JANUARY TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Plaintiffs' lot and defendant's lot were originally one piece; by division and sale to different parties, plaintiffs' lot was left with no way to the public thoroughfare except through the portion sold to defendant.

Held, affirming decision of the Commissioners, that plaintiffs were entitled to a right of way by necessity over defendant's lot.

Achi vs. Poni, ante 176, followed.

OPINION BY McCULLY, J.

RIGHT of way. Appeal from the Commissioners.

By the testimony the plaintiffs' lot and the defendant's lot were originally one piece. By the division and sale to different parties the plaintiffs' lot was left with no other way out to the public thoroughfares than through the portion sold to the defendant. This right of way has not always been denied, though it appears that for a time the plaintiffs had a way out by sufferance which they used to some extent over a vacant lot which has since been built up and closed. Their *non-user* was neither for the length of time requisite to establish an abandonment of the easement, nor was it coupled with any circumstances tending to show an intention to abandon it. See Washburn on Easements and Servitudes, 551. Their right of way by necessity therefore exists and is unimpaired.

The doctrine controlling this case was fully set forth in *Achi vs. Poni*, July Term, 1884. We confirm the judgment of the Commissioners in favor of the plaintiffs in manner and form as expressed in their judgment.

W. R. Castle, for plaintiff.

A. Rosa, for defendant.

Honolulu, March 9, 1885.

KAIMIOLA *et al.* vs. BENI *et al.***EXCEPTIONS FROM RULINGS OF McCULLY, J.****JANUARY TERM, 1885.****JUDD, C. J.; McCULLY and AUSTIN, JJ.**

Under plea of general issue, in ejectment, defendant may give evidence of any right under which he claims; and a new trial will not be granted for surprise, where defendant at the trial set up claim of inheritance, having previously, in a conversation with plaintiff's attorney, said he claimed by adverse possession.

Where one of the grounds for a new trial is newly discovered evidence; held that the evidence of a friend of plaintiff, who sat with him at the trial, and whose testimony might have been ascertained with reasonable diligence, cannot be said to be newly discovered.

Exceptions overruled.

OPINION OF THE FULL COURT, BY McCULLY, J.

UPON bill of exceptions to ruling of the trial Justice on a motion for new trial, denying the motion. The case was ejectment. The grounds of the motion are surprise and newly discovered evidence.

The surprise consisted in the defendants offering evidence to maintain a right to the premises by inheritance. The plaintiffs claim that by some conversation or statements by defendants, previously made to plaintiffs' attorney, he had reason to believe that they held solely by adverse user.

Upon examination of the answer, it appears that the defendants set forth that they held the premises in question by a good title of their own. And that they had held possession for more than twenty years. This does not disclose whether their title was by inheritance, devise or conveyance. But, under our statute, they were not bound to plead anything more than the general issue, under which they might give evidence of any right whatever, without notice to the plaintiff. They did, however, notify the plaintiffs that they claimed by some title independent of a prescriptive right, and would avail themselves of both.

The plaintiffs say that the defense by inheritance surprises them, because the defendants had stated in conversation to their counsel that they depended solely on adverse user. If this were a tenable ground under any circumstances, it could not be available after a plea setting up other defenses. But we do not understand that a party may waive his right to, or be estopped from, a defense by his statements to counsel, or that counsel can claim surprise on being confronted with a defense which had not been suggested in such a conversation. It is a familiar rule of law that parties are not limited in their rights of action by compromises offered for the sake of peace and to avoid litigation, where they have not been accepted and the claim is brought for the determination of law. By a stronger reason, it should be held that no right is lost by a defendant's statement of his title. When the matter comes to the arbitrament of a court, he is in the hands of counsel; he is entitled to all his legal defenses his opponent may expect they will make.

We may add that the affidavits as to the statements made, which are claimed to have led to the surprise, are well met by counter affidavits, but we do not base our ruling on the fact or otherwise of misleading statements having been made.

The newly discovered evidence is that of a person who is shown to have been a friend or connection of the plaintiffs, who was present in Court during the two days of the trial, sitting with the plaintiffs. Anything which such a witness is now ready to testify to cannot be said to be newly discovered, and not within the plaintiffs' power to ascertain and produce by reasonable diligence at the first trial.

Exceptions overruled.

W. R. Castle, for plaintiffs.

J. L. Kaulukou, for defendants.

W. A. Kinney, of counsel for defendants.

Honolulu, March 9, 1885.

JAMES KAHUI *et al.* vs. LAUKI *et al.*

EXCEPTIONS TO RULINGS OF McCULLY, J.

JANUARY TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

The law that a will cannot be proved after expiration of five years from death of the testator, does not apply to wills executed prior to 1859; *Will of Nanino*, 2 Haw., 762.

A document in form of a will, held to be a deed; and to be admissible in evidence under claim of adverse possession.

Exceptions sustained.

OPINION OF THE FULL COURT, BY McCULLY, J.

Ejectment. The defendant offered in evidence the following instrument, as translated from the Hawaiian language:

"WILL."

"Know all men by these presents that I, Kimo, hereby devise my land of Kapohaku, at Wainiha, and the house lot at Kapaloa, to Kaninui forever. Because it was his money, \$5, that paid for this kuleana. I paid no money. My interest on the land was only my name. No money of mine bought it.

"In testimony of this devise I hereby set my name.

(Signed)

"KIMO.

"No one is to dispute this devise of mine to Kaninui. It is his for ever and ever.

"Witnesses:

(Signed)

"KUA (W),

"KAPUA,

"D. W. HALEMANU,

"L. KAUKA.

"Scribe: D. W. HALEMANU.

"Decided upon (done) at Wainiha, A. D. 1854, 12th June."

The trial Justice refused to allow this to be read to the jury, but instructed them that they might consider that defendant had produced an instrument under which he and his privies might

have been holding adversely, but that the instrument itself gave no title, and it could not be read to them. To this refusal and instruction the defendants except.

The objection to the admission of the instrument was based on Sec. 1474 of the Civil Code, which prescribes that no written will shall be allowed to be proved after the expiration of five years from the death of the testator. In the case of the *Will of Nannino*, 2 Haw., 762, it is held that this limitation does not apply to wills of testators deceased before the enactment (1859).

We may assume that it was in evidence that this testator, devisor or grantor died previous to 1859. Evidence to this effect was given, and should have been incorporated in the bill of exceptions. In that case, then, the limitation of time would not apply to prevent this instrument from receiving probate as a will.

But, although the instrument is in the phraseology of a will, there are grounds for treating it as a conveyance. It sets forth a reason and a consideration. The purchase money had been paid by the grantee, and the grantor had never had anything but a nominal ownership in the land. The evidence further shows that the instrument was made, not in view of death, but of the grantor's leaving that part of the island. He moved to the opposite side, and there lived till his death, two years later. The instrument was delivered to the grantee, who thereupon took possession of the land, and we doubt very much if, as a will, it could have been revoked or superseded by a later will.

But, whether we regard this as a will or as a deed, it seems to us that the defendant should have been allowed to prove the execution of the instrument. It would have proved a declaration by the nominal patentee Kimo, made in solemn form, that he was not the equitable owner of the land, but that it belonged to Kani-nui, to whom he surrendered it. Kaninui and his heirs, the defendants, holding it adversely for thirty years under this paper, would have a good defense in this action.

The exceptions are sustained.

Kinney & Peterson, for plaintiffs.

J. M. Poepoe, for defendants.

Honolulu, March 9, 1885.

W. C. ACHI *vs.* KAUWA *et al.*

EXCEPTIONS TO RULINGS OF McCULLY, J.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The actual possession of land by a party, under an unrecorded deed, is constructive notice to a subsequent purchaser of the land, whose deed is recorded.

OPINION BY AUSTIN, J.

THIS is an action of ejectment.

The plaintiff was the grantee of the heirs of the patentee of the land by a recorded deed. The defendants claim under an unrecorded deed from the patentee, dated in 1867, to the defendants constituting a "hui" (firm), and show that some of the defendants live and are supported on the land, and cultivate parts of the same yearly, and fence what they cultivate; and that there are two houses on the land which have stood a long time.

The plaintiff claims that this unrecorded deed is void under Sec. 1262 of the Civil Code, which provides that it "shall be void against any subsequent purchaser in good faith and for a valuable consideration not having actual notice of such conveyance, whose conveyance shall be first duly recorded."

To make the second deed hold, the claimant under it must purchase in good faith, for value, not having actual notice of the first deed.

The New York recording act provides that "an unrecorded deed shall be void against a subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded."

In *Tuttle vs. Jackson*, 6 Wend., 213, the leading case in the Court of Errors in New York, decided in 1830 under the latter statute, it was held that actual possession of the land sold under an unregistered deed is constructive notice to the purchaser and imposes upon him the duty to inquire as to the rights of the per-

son in possession, and that as to him the purchaser cannot have the benefit of the recording act, because not deemed a purchaser in good faith for value. This decision has been followed and never since questioned in that State.

See *Brown vs. Volkening*, 64 N. Y., 76. To sustain his view the Chancellor cites the opinion of Chief Justice Parsons in *Norcross vs. Widgery*, 2 Mass., 508. Thereafter, however, and prior to the case of *Pomroy vs. Stevens*, 11 Met., 244, cited by plaintiff's counsel, decided in 1846, a statute was passed in Massachusetts which expressly provides "that no conveyance of real estate shall be valid and effectual against any person other than the grantor and his heirs and devisees and persons having actual notice thereof, unless it is made by a deed recorded as the statute directs." And under this statute it was and is held in Massachusetts that no implied or constructive notice of an unregistered deed will give it validity against a subsequent purchaser.

In 6 Wendt., 257, Chancellor Walworth refers to *Doe vs. Alsop*, 5 Barn. and Ald., 142, decided under the Middlesex Registry Act, 7 Anne, Chap. 20, where the holding was like that in the Massachusetts cases, and says that the act is imperative, that the conveyance shall be void against any subsequent purchaser, and that the words *bona fide* purchaser are not used in the act; and refers to a similar decision in Virginia, where the law and the decision were subsequently changed.

See also *Daniels vs. Davidson*, 16 Vesey, 268, 17 Vesey, 433, where the New York doctrine is sustained. In equity and at common law without reference to special statutes; and, it seems to us, upon reason; good faith requires a purchaser of land to take his title subject to the claims of parties in possession when he buys. Under our statute, if the party in open possession is unable to show actual notice of his unregistered deed to a subsequent purchaser, his possession is constructive notice to such purchaser of all his rights, and he cannot be disturbed therein.

In the case at bar the land was agricultural land. Of such land the possession, as shown under a deed conveying the whole, is sufficient to constitute constructive notice of the defendants' rights to the whole, by many authorities both here and in the United States. See *Maule vs. Waihee Sugar Co.*, 4 Haw., 637.

We have lately fully considered the nature of adverse possession of similar lands in this country and fully examined the line of authorities cited by the plaintiff's counsel under this point. We do not deem it necessary to re-examine the same now. See *Mahukaliili vs. Hobron*, ante 104.

For these reasons the exceptions are overruled.

W. R. Castle, for plaintiff.

F. M. Hatch, for defendants.

Honolulu, March 10, 1885.

HARRIET A. COLEMAN vs. CHARLES C. COLEMAN.

RULE TO SHOW CAUSE.

JANUARY TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

An appeal from a decree of separation was not perfected within the time prescribed by Rule of Court, but counsel for appellee waived objections, and the case was heard on appeal, resulting in a reversal of the decree.

Held, distinguishing *Paakuku vs. Komoikehuehu*, 3 Hawn., 642, counsel had the right to make the waiver; it affected the jurisdiction of the Court as to the persons, not as to the subject matter.

OPINION OF THE COURT, BY CHIEF JUSTICE JUDD.

THE Chief Justice made a decree in this case in favor of petitioner on the 12th September, 1884. The respondent noted an appeal to the Court in Banco. A bond for costs was duly filed within the ten days required by rule of Court, but accrued costs were not paid until the next day after the ten days had expired.

At the October term—October 15th—a motion was made by respondent's counsel to place the cause upon the calendar. The motion was resisted on the ground that the appeal was not properly perfected.

Pending a decision, petitioner's counsel appeared before the

Court in Banco on October 31st, and withdrew their objection to the allowance of the appeal, and the case was presented and argued before the Court on its merits.

On January 12, 1885, a majority of the Court rendered a decision reversing the decree of the Chief Justice. *Ante*, page 260.

On motion by petitioner's counsel, filed January 20th, the Court ordered that a rule issue returnable before the full Court on the 30th January, 1885, ordering the respondent "to show cause why the decree of the Chief Justice of the 12th September, 1884, should not stand as a final judgment and decree herein, on the ground that, as appears by the records and papers on file, no appeal was taken and perfected as required by law."

From the testimony offered it seems clear that the withdrawing by counsel of objections to the appeal was not without the consent of the petitioner.

A. S. Hartwell and W. R. Castle, for petitioner, urge that the Court in banco has not obtained jurisdiction of the cause. The absence of a matter necessary to give the Court jurisdiction cannot be waived. The rule requiring costs to be paid within ten days as one of the steps necessary to an appeal has the force of law. Failure in this respect renders the appeal nugatory, and no agreement can make it valid. Parties cannot waive requirements which are for the benefit of the State. This case is to be distinguished from those in which the waiver affects irregularities pertaining to the jurisdiction over the person only, the Court already having jurisdiction of the cause and subject matter, and this matter in question affects the cause and subject matter and cannot be waived.

Puakuku vs. Komoikehuehu, 3 Hawn., 642; *Re Oopa*, 3 Hawn., 407; *Rex vs. Cullen*, 3 Hawn., 122; *Est. of Keliiahonui*, July Term, 1866; *Paona vs. Heanu*, 3 Hawn., 591; *Tisdale vs. Bark Almy*, 4 Hawn., 503; *Est. of Kailikauoa*, 3 Hawn., 459; *Kauhi vs. Liaikulani*, 3 Hawn., 356; 38 Cal. 286; 4 Cush., 270; 133 Mass., 465; 6 Cush., 29; 119 Mass., 295; 5 Cush., 615; 17 Pick, 295; 21 Conn., 530; 22 Pick, 295; 23 Conn., 175; 10 Cal., 31; 24 Cal., 98.

C. W. Ashford, for respondent—The failure to pay costs was a mere irregularity and may be waived. It is considered to be

waived if the party having a right to complain of it takes any subsequent step inconsistent with an intent on his part to take advantage of it. Consent cures error.

Hansen vs. Hoitt, 14 N. H., 56; *Holmes vs. Rogers*, 13 Cal., 191; *Keyes vs. Warner*, 45 Cal., 60.

The Court has jurisdiction of the subject matter—*i. e.*, authority to take cognizance of, try and determine cases for separation from the marriage relation. Cooley Const. Lim., p. 397. The Court may gain jurisdiction of the parties by their consent or by their appearance without taking objection; *id.*, 400; *Crane vs. Daniells*, 20 Conn. 331; also 29 Conn., 415; 32 Conn., 108; 32 Conn., 147; 6 Mich., 279; 41 Mich., 227; 26 N. H., 232; *Washington Bridge Company vs. Stewart*, 9 Howard, 413; 39 Mich. 123; 22 Mich., 78; 30 Me., 552.

BY THE COURT:

Upon a careful review of the authorities cited by both sides, we are of the opinion that the rule should be discharged.

The Court in banco has jurisdiction to hear and determine, on appeal, causes for separation from bed and board. *Vide* Sections 1336 and 859 of the Civil Code.

“A Court has jurisdiction of any subject matter, if, by the law of its organization, it has authority to take cognizance of, try and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by it. And on this point there is an important maxim of the law, that consent will not confer jurisdiction, by which is meant that the consent of parties cannot empower a Court to act upon subjects which are not submitted to its judgment by the law.” Cooley’s Constitutional Limitations, p. 398. A jurisdictional defect of this character can be made available at any stage of the case, as the defect is fundamental, being a total want of power to act at all. A familiar illustration would be a District Court assuming to try a libel for divorce, or an indictment for murder.

In the case we are considering the Court had jurisdiction of the parties; they appeared and submitted their case on its merits to the final adjudication of the Court. Says Cooley *id.*, p. 409: “It is a general rule that irregularities in the course of judicial proceed-

ings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the Court, ought to have been observed in the case." The learned author says further that even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the cause inconsistent with an intent on his part to take advantage of it.

This doctrine seems to be abundantly sustained by authority. In the case of the *Washington Bridge Company vs. Stewart*, 3 Howard, U. S., 413, the Supreme Court of the United States held that though this Court had jurisdiction only, on appeal, from *final* decrees of the Circuit Court, yet if this Court actually entertains jurisdiction and affirms the decree of a Circuit Court, etc., the question whether the decree appealed from was final cannot be raised on a second appeal. The Court say: "To permit afterwards upon an appeal from proceedings on its mandate, a suggestion of the want of jurisdiction of this Court upon the first appeal, as a sufficient cause for re-examining the judgment then given, would certainly be a novelty in the practice of a Court of equity."

In *Post vs. Williams*, 33 Conn., 147, the defect was that commissioners to settle boundaries had not taken a special statutory oath. The Court say: "There are certainly numerous decisions in our reports that the positive requirements of statutes in certain cases must be exactly complied with. But there are quite as many, especially of late years, to the effect that although an error may be of a fatal nature, yet the right to take advantage of it may be lost by laches or waiver creating an estoppel." "So far as there is a conflict, those decisions are most consistent with sense and justice which prevent a party from going to trial on the merits and accepting the result if favorable, but if otherwise, taking advantage of a technical difficulty which he knew of or should have known from the beginning." "The general rule is that when the Court has jurisdiction of the parties and the cause, and there has been in the course of the proceedings an irregularity which might be fatal, as the omission to do some act required by law or the doing it improperly, the objection may be waived or a party may be estopped from raising it."

It is not necessary to discuss the question of estoppel or waiver by implication, for in the case at bar there was an express waiver of the irregularity in open Court, and we are freed from difficulty in deciding whether the party having the right to complain may waive the defect or irregularity by Sec. 7 of the Civil Code, which enacts that "private agreements shall have no effect to contravene any law which concerns public order or morals. But individuals may, in all cases in which it is not expressly or implicitly prohibited, renounce what the law has established in their favor, when such renunciation does not affect the rights of others and is not contrary to the public good."

This Court has been uniformly strict in its rulings upon all matters concerning appeals, compelling parties to comply literally with the requirements of the statutes and rules of Court, but in only one case has it held that counsel have not the authority to waive objections to non-compliance with these rules. This is the case of *Paakuku vs. Komoikehuehu*, 3 Haw. n., 642, decided in 1875. This case has had our careful attention. It was rendered by a divided Court and much stress is laid by the majority of the Court that the written waiver (which was of the fact that the appeal was perfected only on the thirteenth day after the decision) was made by counsel without the consent of his client. It seems that the case was argued and submitted to the full Court on its merits, but petitioner's counsel says at the end of his brief: "The plaintiff's counsel allowed the defendant's counsel, as far as he is concerned, to perfect his appeal after the time. He says nothing on that point. It is for the Court alone to reopen the decree or not." There is nothing in the papers on file to show that the plaintiff personally objected to the course taken by her counsel, and the Court, inspecting its record, on its own motion declined jurisdiction on the ground that the appeal had not been perfected in time. We think the majority of the Court erred in holding that such an irregularity could not be waived by counsel, and so far as the decision has established this as law, we feel obliged to overrule it. The Court undoubtedly considered that the defect affected the jurisdiction of the Court over the subject matter, and the views now presented, that it affected the jurisdiction over the persons only, were not clearly elaborated by counsel.

The case at bar can be distinguished from *Paakuku vs. Komoikehuehu*, inasmuch as no suggestion was made of the want of jurisdiction to try the case on appeal, by reason of the appeal not being properly perfected, while the case was pending, whereas in the former case, *Paakuku vs. Komoikehuehu*, the point was suggested in plaintiff's brief.

We are of opinion that the waiver cures the defect, and accordingly discharge the rule.

The decree of the full Court must stand.

A. S. Hartwell, for petitioner.

C. W. Ashford, for respondent.

Honolulu, March 19, 1885.

MELE HOLELUA *et al.* vs. KEONI KAPU *et al.*

EXCEPTIONS TO RULINGS OF McCULLY, J.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The grantee of the heirs of one of several joint plaintiffs in an action of ejectment, is estopped by the judgment therein, in a subsequent suit by such co-plaintiffs against him.

OPINION OF THE COURT, BY AUSTIN, J.

THIS is an action of ejectment brought by plaintiffs to recover lands in Honolulu, as heirs of Kane, the patentee, under Royal Patent 5,718.

The defendant Kahea Kapihi claims title to an undivided half of the said land, as grantee of the heirs of Kailiuli, the widow of Kane, and denies the heirship of the plaintiffs.

Thereupon the plaintiffs produce the record of a judgment in ejectment for an undivided half of certain lands in Honolulu, between them and Kailiuli, as plaintiffs, and the defendant Kapu, as defendant, in plaintiffs' favor, establishing them to be heirs of

Kane by their mother and his daughter Hiapo, and claim that the defendant Kapihi is thereby estopped from claiming as such grantee to the heirs of Kailiuli. The Court held defendant so estopped.

Further, the said defendant showed himself and defendant Kapu to be in possession of separate parts of the land claimed, and that no demand for rents and profits had been made, and so defendant claimed that there could be no recovery therefor against the defendants jointly. The Court held there might be a joint recovery against defendants, and the plaintiffs recovered the land claimed and damages \$50. The defendant Kapihi appealed to this Court.

In the judgment claimed as an estoppel, these plaintiffs and Kailiuli joined in an allegation that they were entitled, as tenants in common, to the moiety they claimed as heirs by descent from Holelua, the patentee, and the defendant Kapu denied it. The question litigated was whether the plaintiffs were such tenants in common, and to show that fact it was necessary to prove, and was proved, that Kane, the brother of Holelua, left a daughter, Hiapo, the mother of these plaintiffs, now dead, and a widow, the said Kailiuli. Kailiuli was sworn at the trial to the fact so required.

The defendants' counsel says there was no estoppel, and cites Freeman on Judgments, Sec. 158, as follows: "Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action."

The rule as to estoppel by judgment is well laid down in *Emberry vs. Connor*, 3 Const., 522, as follows: "That the judgment or decree of a Court possessing competent jurisdiction is, as a general rule, final, not only as to the subject matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided, can admit of no doubt," and again, "The general rule is that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, as between the parties taking it and their privies, is conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found."

To render parties adversary parties in an action, it is not necessary that they should be opposed as plaintiff and defendant, but that their interests should be opposed to each other, and that the litigation should settle the question between them, either by admissions of record or by proof.

Often in courts of equity the rights of different defendants are litigated and settled as between themselves, even without definite allegations, but if their rights were adverse, and not pleaded or litigated, the judgment rendered would not be conclusive between them. See *Graham vs. Railroad Company*, 8 Wall., 704, cited by defendants' counsel.

But we apprehend that no case can be found where a party joins in a pleading with other plaintiffs, whom she might dispute as to a fact material between her and them, and alleges that their claim as to that fact is true, and that claim is litigated in the action and decided in their favor, and judgment thereon is entered, where such judgment was not held conclusive upon all parties. In that case, had Kailiuli denied that she was tenant in common with these plaintiffs, and that fact had been established, she would not only have been tenant in dower as she alleged, but would have been entitled in fee to one undivided half of the land there claimed as widow of Kane, who died without issue. Having solemnly admitted of record in that case that she was not such statutory heir to one half, and that these plaintiffs were such heirs as alleged by her, and tenants in common with her, having sworn to that fact on the trial, and that question being litigated by another interested on an issue to which she was a party, she and her privy, the defendant, are estopped.

In *Wilcox vs. Mower*, 5 Mass., 407, three plaintiffs were joined and judgment was rendered against them for costs, and in a subsequent action against one for contribution to pay costs, that one was permitted to show that the suit was begun without his knowledge or consent, and that he never personally joined in the issue. This was right, but in that case, as to the issue litigated, he was held estopped, and the question of contribution between them was not in issue. See *Keahi vs. Bishop*, 8 Haw., 546.

We find no case cited where joint plaintiffs in a litigated issue are not estopped by the result.

The point as to damages was not argued by the appellants' counsel, and we think cannot be maintained.

The exceptions are overruled.

E. Preston, for plaintiffs.

Kinney & Peterson, for defendants.

Honolulu, March 28, 1885.

REBECCA HOWLAND *vs.* KAPIKA NAONE *et al.*

APPEAL FROM DECISION OF AUSTIN, J.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The Court declines to set aside two deeds on the alleged ground of fraud practiced upon the grantor, an aged Hawaiian, feeble in mind and body; there being no convincing proof that he was unduly influenced.

Circumstances of mere suspicion, leading to no certain results, will not be deemed a sufficient ground to establish fraud.

Decree, dismissing bill, affirmed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS case comes up on appeal from a decision of Mr. Justice Austin, rendered January 7, 1885, dismissing the bill.

After hearing the proofs and arguments of counsel, and on a careful examination of the case, we are of the opinion that the decision herein made should be affirmed, and accordingly dismiss the bill.

We add that the decedent Kalaau, having settled his land upon his wife Kapika, was entitled during his life to the possession of the estate and its rents and profits, by virtue of his being her husband. This was no more favorable to his wife than the will first made to her. The fact that he afterwards changed his mind and made a will in favor of the plaintiff, for whom he is shown by the testimony of Mr. Holt to have had most friendly and pa-

ternal feelings some fifteen or twenty years ago, while his first wife, Maalo, was alive, does not overcome the clear testimony of Mr. Widemann and others that he executed the deeds to defendants with a full understanding of their import and effect.

S. B. Dole, for plaintiff.

F. M. Hatch and *A. Rosa*, for defendants.

Honolulu, March 18, 1885.

DECISION OF AUSTIN, J., APPEALED FROM.

This is an action in equity to set aside two deeds, by which certain real estate, worth about \$5,000, situated in Honolulu, was vested in the defendant, Kapika Naone.

The plaintiff claims to be entitled to the property as sole devisee of Kalaau, deceased, the former husband of defendant Kapika, by a will bearing date October 28, 1882, and duly proved March 25, 1884.

The deeds bear date respectively November 17, 1882, and were duly acknowledged on that day, and duly recorded on the 23d day of November, 1882. One of the deeds was from Kalaau, deceased, to the defendant Alakema Naone, and the other deed was from him to the defendant Kapika, the wife of deceased, and both were executed with the apparent intention of vesting the property in her, because she was Kalaau's wife. Kalaau died on the 2d day of February, 1884, and was then a man of over eighty years of age. For many years he had been nearly blind, but until within two or three weeks of his death was able to walk and to get about his own premises without aid. At the time of the execution of the will and deeds, and thereafter till a very few days before his death, his mind was usually clear, and he could see and recognize those people he knew, and talk rationally with them. He was feeble both in mind and body, owing to his great age, but he was not insane. He was of fair understanding for one of his years. Doubtless, when he executed the will and deeds referred to, and a prior will in favor of his wife, dated July 30, 1881, he was of sound mind, and of sufficient capacity to make such instruments.

But twenty days passed between the signing of the will to the plaintiff and the deeds to the defendants. There is no proof of

change in his brain power during that time. In order to recover, then, the plaintiff must show that Kalaau was deceived and cheated, and did not know what the deeds meant, and did not intend to vest the land in his wife; that he was unduly controlled and influenced by the defendants, and by them or one of them induced to do what he did not comprehend.

The testimony bearing on those points is voluminous on both sides. Kalaau and Kapika were married in 1874, and lived together in harmony until sometime after the execution of the will in Kapika's favor, bearing date July 30, 1881. After that, and at the time of the making of the will of October 28, 1882, in favor of the plaintiff, the plaintiff's proof tends to show that Kapika was untrue to her marriage vow; that the defendant Alakema Naone was her paramour; that Kalaau knew it, and therefore felt hostile to her, and designed to disinherit her on that account by the will to the plaintiff. The plaintiff's proofs also tend to show that Kapika failed many times properly to attend to the physical wants of Kalaau during the last year of his life.

The defendants were married about six months after the death of Kalaau. They both swear that they were not guilty of adultery together, and their proof tends to show that Kalaau was well and faithfully treated by Kapika, as his wife, up to the time of his death. Kapika is still a young woman, apparently about thirty years old, and her husband is apparently younger than she.

Kalaau and Kapika had no children, and by the proof Kapika was Kalaau's sole heir. If so, but for the will to the plaintiff, Kapika would have taken all the property by descent, and half of it, in addition to dower, in any event.

By the deeds to defendants, Kalaau reserved to himself, in effect, a life estate in his property.

The plaintiff is a woman of middle age, and swore that she was an old friend of Kalaau, though not a relative; that she had known him from childhood, and in her girlhood had stayed at intervals in his family. Just before the will was drawn she visited Kalaau's house, and learned that he was staying with his wife in rooms adjacent to Queen Kapiolani's stables. She went and found him there, lying on a mat on the floor, but partly dressed, and apparently uncared for. Alakema and Kapika were

also there. Kapika says the rooms were rooms of Alakema's sister. Kalaau, against Kapika's remonstrance, left at once, and went with plaintiff to his own house. Two or three days after that the will to plaintiff was drawn by a native, Kukahiko, procured by plaintiff at Kalaau's request. Plaintiff swears it was drawn by Kalaau's express direction; that he said he did not want to make a deed, but a will to her, because if he deeded to her she would not take care of him. Plaintiff says she told him to deed half to his wife, but he said no, as his wife did not take care of him. For a couple of months thereafter plaintiff furnished food to Kalaau, and collected his rents.

About December 28, 1882, plaintiff and Kukahiko saw a notice pasted on a fence on Kalaau's premises, signed "Kapika," in substance forbidding the payment of rent to anybody else, as she had bought the land of Kalaau. They went to Kalaau's house, and plaintiff's version of the ensuing quarrel is that she told him she had seen the notice by his wife that she had bought the land of him, and he at once became very angry. He said he did not sell his place, and that plaintiff must go to the lawyer Hatch with him. He asked his wife if he had sold his property, and she said no; he started to go, and his wife held on to him, and they quarreled and struggled and fell down together. Mrs. Howland says Mr. Hatch was sent for, and came and said he drew the deeds, and Kalaau said he did not understand it so. Hatch left, and Kalaau said he must have a lawyer to annul the deeds. Kapika, however, swears that Hatch asked Kalaau if he wished to set aside the deed, and he said no. Mr. Thurston came the same day with Kukahiko, and Kalaau showed anger, and said that the land was his; that he had not sold it; that there was a fraud about the land. Mr. Thurston failed to get a straight story, and went away, and in four or five days returned and saw Kalaau and his wife only. The plaintiff was not then present. Kalaau's manner had changed. He was quiet, and said, "It is done; it will do." Mr. Thurston's impression was that Kalaau was cowed down by outside influence. Kapika says that at the quarrel the plaintiff and Kukahiko told Kalaau that he had lost his land, and would be like a beggar in the streets if his wife had a mind to turn him out. He asked, "Will that be so?" and they said,

"Yes," and in consequence of that Kalaau got angry with Kapika, that she did not tell him he had not sold his land.

From the plaintiff's evidence of Kapika's infidelity, and the lack of care to Kalaau, and dissent to the deeds, with his feebleness of mind and body, the plaintiff claims that she must prevail. That it is impossible to believe he intended to do what was done by the deeds. As against this, however, comes the strong proof of Hatch, and Widemann, the acknowledging officer. Mr. Hatch says the defendant and Kalaau and the sister of Alakema were present; that he thinks Kalaau handed him the Royal Patent; that he asked who was to be the grantee in the deed; that they replied Kapika, but he don't know who replied; that he then explained that Kalaau could not deed directly to his wife, but must deed to a third party, and from a third party to his wife, and suggested Alakema to be the third party, and Kalaau said, "Yes." Then he wrote the deeds in Hawaiian, and went near the parties and read the deeds slowly to Kalaau. He assented to them, saying yes from time to time as they were read to him. Then Judge Widemann was called in, and Hatch asked him to explain the deeds to the old man, and he did so. Judge Widemann confirms the testimony of Hatch, and says he took special pains to explain the matter to Kalaau, and believes he understood it fully. If he understood the will to the plaintiff, and then knew the difference between it and a deed, I do not see how he could fail to understand these deeds. At the quarrel he suggested the name of Hatch as the lawyer who, he said, had wronged him; six weeks had passed, but he remembered him. How can we believe he did not know what was done by Hatch, and was so carefully explained to him. The after dissent is not sufficient to show that he did not really intend what was done by the deeds. It may have been simulated, as suggested, to mollify Mrs. Howland. It may have been caused by what Kapika says, that they told him that he might be driven by her into the street destitute, which was untrue.

For fourteen months after the quarrel he failed to bring an action to set aside the deeds. He sent for the plaintiff, and asked for the rent she had collected for him. It is unnatural to believe he was in fear all this time. The nature of the quarrel shows

that he then had no fear of Kapika. The evidence does not convince me that he was ever in fear or coerced. The evidence of constant neglect seems unreliable, and, if he intended to consent to the deed, is futile. It is only important as tending to show the absence of such an intention. He may have suspected or believed his wife unfaithful, but, if so, he seems to have forgiven her, or at least not to have sought any remedy against her; such forgiveness is not improbable. He had lived with her for many years. As his wife she had a right to ask him to provide for her. But no influence seeking that is proved, and no undue influence ought to be inferred in the case. "Circumstances of mere suspicion, leading to no certain results, will not be deemed a sufficient ground to establish fraud." Story Eq. Jur., Sec. 190.

There are circumstances of suspicion on both sides. There is no good reason for making the will to Mrs. Howland. The motive of revenge upon his wife seems not enough. It looks as if, in his weakness, Mrs. Howland may have unduly influenced him to will to her. Against such attempts on his good nature thereafter, it may be the old man was willing to guard, as he did by the deeds. His acts show that he may have repented the execution of the will.

The evidence of Mr. Kinney of dishonest proposition by defendant Alakema as to deed or release, which possibly may have referred to instrument by Kalaaui, though there is no proof of it, occurring long after the deeds were executed, may cast suspicion on his acts and evidence, but the case is strong without him. Other ear-marks, showing shades of untruth, appear on both sides, but there is not enough to countervail the strong showing of the free execution and delivery of the deeds by a competent grantor.

For these reasons, the bill must be dismissed with costs.

Dated January 7, 1885.

JANUARY, 1885.

WM. MUTCH *et al.* vs. HOLAU *et al.*

APPEAL FROM DECISION OF JUDD, CHANCELLOR.

JANUARY TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The time for taking an appeal from a decision at Chambers runs from the date of the decree, not from date of the decision.

Motion to dismiss appeal overruled.

OPINION OF THE COURT, BY McCULLY, J.

ON motion to dismiss appeal.

This case was brought before the Chancellor, who filed his written opinion in favor of the plaintiffs, October 23, 1884. A formal decree in accordance with the findings having been prepared by counsel, was signed by the Chancellor and filed October 25th. The defendants having noted an appeal, completed the necessary steps therefor within ten days from the filing of the decree, but not within ten days from the filing of the opinion. The question to be considered is whether the time allowed for taking appeal runs from date of delivery of the opinion or of signing the decree, when, as in this case, the latter is made on a day subsequent to the former.

It is remarkable that this question has not, to our knowledge, ever before been raised.

It has not been a matter of uniform practice here to follow the opinion or decision of the Court, as written and delivered or filed, by a formal decree. Especially in the earlier years of the existence of the Court was it generally left solely to such note as the clerk made on his record of the effect of the conclusion which the Court arrived at and pronounced in its opinion. And when formal decrees were presented it was often a considerable time after the decision. When appeal was taken it was very much the custom to defer the final closing of the case by decree until after the hearing and decision on the appeal, the time for taking and perfecting appeal being considered to run from the date of rendering the de-

cision. It was only by Rule of Court No. 4 that the time for appeal from "any decision, judgment, order or decree made at chambers" to the Court in banco was limited to ten days, the statute prescribing no time therefor.

But the question now being raised, we have no difficulty in saying that the proceeding before the Chancellor was not concluded before the signing of a decree. The opinion expressed a finding that two certain deeds under consideration were fraudulent, and that a decree would be made accordingly. The definite specific order made and relief granted was prescribed only in the decree. The defendants were bound by the particulars therein expressed, and not liable for anything not covered by the decree.

In this case, as in many others, the specific items are not stated in the judge's opinion. They are the legal result of the general finding. Under the prayers in the bill for certain relief and for such general relief as may be suitable, and by a finding which is in favor of the bill, or to some extent in favor of it, or against the bill, the action of the Court, whatever it is, should be determined and embodied in a decree. It is not enough to intimate that a decree will be made on certain lines; it must be made. It then becomes the solemn and exact arbitrament of the Court, which is not made until this is done. By this all parties are bound, or if it is a case in which appeal may be taken, it is this from which it is taken.

The motion is overruled.

S. B. Dole, for plaintiff.

J. M. Peepoe, for defendant.

Honolulu, March 23, 1885.

See new Rule VIII. E.

WM. MUTCH *et al.* vs. HOLAU *et al.*

APPEAL FROM DECISION OF THE CHANCELLOR.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A deed made by a woman to her brother, just before her marriage, held to be in fraud of the husband's rights, and set aside by the Court.

OPINION OF THE FULL COURT, BY McCULLY, J.

FOR the statement of the case and evidence we refer to the opinion of the Chancellor. In the argument made before the Court in banco it was said by the learned counsel for the defendants that if the matters of fact alleged in the plaintiffs' bill were established, there was no doubt but that the principles of equity would award the claim made. We have no doubt that the law as set forth by the Chancellor in his opinion above is well sustained upon reason and by the authorities cited. In our view the evidence does support the bill conclusively.

The defendants' version of the facts is entirely at variance with probability and reasonable conduct. According to the defense this young woman (plaintiff) of 19 years, in good health, of good education, a school teacher, with fair prospects in life, being the owner of a piece of real estate in Honolulu yielding \$250 or \$300 per year and worth \$3,000, makes a voluntary deed of this property for the nominal consideration of \$100, which was never paid, to her brother, he being a leper far advanced in the disease, living out the remnant of his unhappy existence in concealment in the house of the girl's guardians, the defendants in this case. And for what motive? In order to assist her brother, say the defense. As if it were not as easy to assist him by contributing a part of or all the income, and as if that would not be obviously better than to vest the property in one who was confined to his house or premises, who could not go abroad to make leases or collect rents or make improvements. He was living in expectation of near death.

And the same parties who set up this motive for the conveyance inconsistently procured a conveyance, for the paltry consideration of ten dollars, from him to themselves, whereby they expected to defeat the descent by inheritance to the first grantor, who should equitably have her own again after it had served the alleged purpose of better supporting her brother.

Now the plaintiff, William Mutch's, interest depends entirely upon the date of the deed. A strong circumstance to show that the deed was made after her betrothal is that she signs herself Myrtle, although misspelling it "Myrtel," a name adopted by her at the suggestion of her intended husband after their engagement to marry. There is no satisfactory evidence to show that she had ever used or been known by this name previously, and there is direct, credible and circumstantially probable testimony that the name was assumed only after the engagement had given him equitable rights against surreptitious conveyances of her property. If we take it as a fact that she never had that name until December, it is conclusive that the deed was not made in September. The acknowledging officer, J. S. Kaanaana, is dead. It is sufficient to say that we have to believe that he lent himself to the fraud of antedating the conveyance. It is merely consistent with his making the date in the certificate of acknowledgment September 5th, that he should cancel the stamp with the same date. There may have been made to him statements and reasons to induce him which did not imply a fraud on the part of any one.

Coming to the second deed we find the same fraudulent defense. The motive advanced for Polikua's refusal to rectify the mischief by a conveyance back to his sister is that he was angry because she had had her infant baptized in the Roman Catholic Church. It is proved that the baby was not born until a month and a half later.

We need only to touch upon these salient points in the case. The marks of fraud are broad and deep. The plaintiffs are entitled to the relief they ask for.

The decree is affirmed.

S. B. Dole, for plaintiffs.

E. Preston, for defendants.

Honolulu, April 24, 1885.

OPINION OF CHANCELLOR JUDD, APPEALED FROM.

In December, 1882, the plaintiff, William Mutch, was introduced to a Hawaiian girl, Mikahala Maau, then about nineteen years old, with a view to marriage.

Holau, defendant, had been appointed the guardian of this girl when she was eleven years old, and continued to act as such guardian, collecting rents, etc., until some time in 1883, when the guardian's accounts were presented to the Probate Court, but no satisfactory settlement was arrived at.

Meanwhile Mr. Mutch called upon Mikahala at Ewa, Oahu, where she was living with the defendants, her relatives. Makanui, defendant, said he wished the girl to marry a white man and they preferred a carpenter, as the girl had a piece of land in Honolulu and the houses upon it needed repair. There was a house adjoining which he wished Mr. Mutch to buy and move on to this lot and live upon in it. Mr. Mutch was a carpenter. This land is situated in the rear of the Government Dispensary, on Maunakea street, and had been left to Mikahala by will of one Kamaha, her grandfather. It is worth from \$2,500 to \$3,000 and was then renting for from \$200 to \$250 per annum. Mikahala also told Mr. Mutch that she had this property.

After a short acquaintance the parties agreed to marry. Mikahala says that Makanui after her engagement told her that she ought to make a deed of this land to her brother, W. K. Polikua, in order to keep it from her intended husband, and that she finally consented to thus dispose of it, and copied a deed prepared for her, signed it and acknowledged it before J. S. Kaanaana, agent to take acknowledgments, who is now dead. The deed is dated 1st September, 1882. Mikahala says it was actually prepared, signed and acknowledged in January, 1883, about a week before her marriage, which took place on the 13th January. The deed was signed in the chapel away from the house, and kept secret from Mr. Mutch. It was delivered by Mikahala to defendants. It was taken by Makanui to the registrar's office for record on the 20th of January. It is signed by Mikahala by the name of "Myrtel K. Polikua." It seems that she bore also the foreign name of "Michael," but on Mr. Mutch's saying during the courtship (December, 1882) that it was not a proper name for a woman and that

he would prefer to call her "Myrtle," she consented to adopt this name, and Mr. Mutch wrote it for her on a slip of paper. There is no evidence that she had ever used this name previous to this time. But as she signed this name to the deed it is conclusive evidence to my mind that the deed was made, as she says it was, subsequent to her engagement with Mr. Mutch, and not, as testified by defendants' witnesses, on September 1, 1882. Mr. Mutch says that Mikahala also told him of her property and that he never knew or heard of the conveyance until some time after his marriage.

Here, then, is a conveyance of a woman, in contemplation of marriage, of all her property without the knowledge of her intended husband and with intent to defraud him.

By all the authorities it must be held void as against the husband, as being in contravention of his marital rights and in disappointment of his just expectations.

To establish the equity in favor of the husband there must have been an engagement of marriage between them at the time of the conveyance of the wife's property. The conveyance must be made in contemplation of the particular marriage. It is essential also that the husband should, up to the moment of marriage, have been kept in ignorance of the transaction. Some authorities contend that he should have known that his intended wife possessed the property. All these ingredients exist in this case.

See Kerr on Fraud, p. 217; 1 Bright H. and W., p. 221; 1 Story Eq. Jur., Sec. 273; *Countess of Strathmore vs. Bowes*, 2 Brown Ch. 277; *Tucker vs. Andrews*, 13 Me., 125; *Ball vs. Montgomery*, 2 Vesey, 194.

There are other facts in this case which I now comment on.

The grantee of the deed, W. K. Polikua, was Mikahala's brother, but he was then, as he had been for a long time, a leper, and died of this disease April 26, 1884.

He was living under the roof of the defendants, who were supporting and caring for him. The consideration named in the deed is \$100, but Mikahala says she was never paid this sum or any part of it. It is not likely that a leper hidden away from observation, supported by his friends, could have such a sum as \$100. That Mikahala, who had some revenue from teaching school, also

contributed to her brother's support and comfort is proven by several letters from him to her.

While thus situated Polikua signed a deed of this property to Holau, defendant. It is dated September 12, 1883, but was not acknowledged until 21st April, 1884, five days before he died. The acknowledging officer, Anakalea Kauhi, says that he questioned Polikua very carefully three times before he took the acknowledgment, and was satisfied that the deed was in accordance with his wish.

The consideration stated is \$10. Defendants say they paid it by a bag of rice worth \$5 and some other articles of food. But they were supporting this leper all this time and would have in all likelihood furnished him with these if the deed had not been executed.

Mr. Mutch says that when he first heard of the deed to Polikua he asked Makanui to let him see it, but he refused, and then he ascertained at the Registrar's Office that it was recorded 20th January, 1883, after his marriage; that he went to see Polikua about it, and Polikua said he would deed the land back again to his wife, as it was hers, and at Polikua's request he went again to Ewa (two weeks before he died) with a deed for him to sign. When he got there he found the defendants at the door. He handed Polikua the deed, and he put it aside and wrote a letter to Mikahala, and afterward told Mr. Mutch that he did not sign the deed, as he was afraid he would be turned out of the house. The letter is dated 15th April, and Polikua says to his sister that in reference to her wish that he leave the property to her child, not to disturb herself, but that when he was dead she was to take the patent, and that she was his only heir and that no one else had any right to the property.

Mr. Armstrong says that Polikua told him he was afraid that Makanui would kill him if he deeded the property back to his sister.

The defendants say that he changed his purpose of conveying the land to Mikahala's daughter because the parents had had the child baptized in the Roman Church, whereas he was a Protestant. But it is evidently false, as the deed is dated the 12th September, 1883, and the child was not born until the 28th October.

It is clear from the testimony that both these deeds were procured by the defendants. They used the influence of Holau as guardian over Mikahala to persuade her to defraud her husband, and they used their power over a dying leper in their custody to make him sign a deed of a property worth \$2,500 for a \$10 consideration which was not paid.

The defendants were throughout the active perpetrators of these frauds and can in no sense be protected as *bona fide* purchasers.

The relief prayed for must be granted.

Decree accordingly.

S. B. Dole, for plaintiff.

R. F. Bickerton, for defendant.

Honolulu, October 23, 1884.

CASTLE & COOKE *vs.* G. H. LUCE, Tax Collector.

SUBMISSION.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Revenue laws are to be construed strictly.

A tax on premiums of insurance companies for "policies issued during the year," held to apply only to new policies, not to annual premiums on a life policy.

OPINION OF THE COURT, BY JUDD, C. J.

THE plaintiffs, as agents of the New England Mutual Life Insurance Company, claim to be refunded taxes paid under protest for 1884, being \$68.39, a tax of 1 per cent. upon \$6,839, amount of premiums received during the year by the said insurance company upon policies issued previous to the 1st day of July, 1883.

The statute by the authority of which the tax in question was levied is Sec. 17 of the Taxation Act of 1882 (Compiled Laws, p. 120). It reads as follows:

"All fire, marine and life insurance companies carrying on business in this Kingdom shall pay for and in respect of every one hundred dollars received by such companies respectively for premiums on policies issued by such companies during the year preceding the assessment, the sum of one dollar, and such companies shall not be charged with any other taxes or duties under this Act."

It is contended, on behalf of the plaintiffs, that by the letter of the statute the annual premiums received by insurance companies are not taxable; that the law authorizes the taxation only of amounts received for premiums on policies issued by the company during the year ending the 20th June, 1884.

On behalf of the defendant, the Attorney General contends that it was the intention of the Legislature to tax insurance companies on their annual receipts, that thus they might bear their proper share of the burden of taxation; that Sec. 34 of the same Act, requiring agents of insurance companies to deliver to the Assessor "a return showing the amount received for premiums during the year preceding," on the said first day of July, further indicates this intention of the Legislature. Sec. 35 provides that upon the failure to make returns the assessor may make such assessment according to the best information within his reach, and the same shall be conclusive.

BY THE COURT.

"The underlying principle of all construction is that which seeks the intent of the Legislature in the words employed to express it. Beyond the words we are not to look, where the meaning is plain and intelligible. If the law is plain and unambiguous, the Legislature must be intended to mean what has been plainly expressed and nothing remains but to give the intent effect." Cooley on Taxation, p. 198, and cases there cited.

Section 9 of the Civil Code, on the construction of laws, prescribes that "the words of a law are generally to be understood in their most known and usual signification."

We find the law authorizing the taxation of insurance companies (Sec. 17 of the Act of 1882, above recited) to be plain and intelligible. It declares that insurance companies, whether fire, marine or life, carrying on business in this Kingdom, shall pay a

tax of one dollar on every one hundred dollars received by such companies "*for premiums on policies issued by such companies during the year preceding the assessment.*"

That is to say, premiums received on *policies issued* during the year preceding the assessment are taxable.

"The general or popular use or meaning" of the phrase in question (and this, by Sec. 9, above referred to, is the general rule of construction), would be that it applied to policies newly issued during the year. Thus, if an insurance agent, speaking of his business, should say that he had issued one hundred policies during the year, no one would be expected to understand that one hundred was the total number of outstanding policies issued during several previous years up to that time, but he would be understood to declare that such was the amount of new business done.

No other construction is admissible. To enable the Collector to charge insurance companies with a tax on all *premiums received* during the year, would require the suppression of the words "*on policies issued by such companies during the year.*" These words limit the premiums which are taxable to those collected on policies issued during the year, and must have some effect. But it is urged that this construction would deprive the Government of the tax upon the annual receipts of life insurance companies for premiums, for these companies do not issue policies to their insured annually, their practice being to issue a policy when the risk is taken, which is kept alive by the payment of annual premiums until the event happens which requires the payment of the amount insured in the policy. Certainly there exists no good reason why life insurance companies should be thus exempted, but this is a matter for the Legislature to cure. The argument is made that the payment of the annual premiums is equivalent to a new contract of insurance, for it keeps alive what would otherwise be a dead policy. The answer to this is that the law imposing the tax says plainly that premiums only on *policies issued* during the year are taxable and it does not say on policies kept alive during the year by the performance of the condition precedent.

The implication of Sec. 34 is that the tax shall be paid on "the

amount received for premiums" on all policies during the year, else why is it required to be returned. It is also reasonable to consider that the annual tax should be paid on the annual income of premiums, rather than that the premium of a policy should be taxed only the first year and thereafter be exempt. But, *quod voluit non dixit*. What was intended was not expressed. The different sections may not be inconsistent with each other. It is by Sec. 17 that the tax is imposed. Can an additional tax be imposed by the section which provides for the return? We think not.

We think that revenue laws are to be construed strictly. Says Cooley: "A strict construction in such case is reasonable because presumptively the Legislature has given in plain terms all the power it has intended should be exercised." Cooley, Taxation, p. 200.

Dwarris on Statutes says: "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden the intention of the Legislature to impose the burden must be explicitly and distinctly shown." Potters' Dwarris, p. 255.

This view is abundantly supported. See *Wroughton vs. Turtle*, 11 M. and W., 561; *Chandos vs. Commissioners*, 6 Exch., 464; *Sewall vs. Jones*, 9 Pick., 412.

We are of the opinion that the tax in question levied was not authorized by the statute, and so order judgment for the plaintiffs.

E. Preston, for plaintiffs.

Attorney-General Neumann, for defendants.

Honolulu, April 9, 1885.

D. McDONALD vs. M. GREEN, *et al.*, Assignees.

APPEAL FROM DECISION OF McCULLY, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Under the bankruptcy jurisdiction of the Supreme Court the assignees cannot be compelled to make a certain sale; the remedy is Specific Performance in Equity.

Assignees having advertised for bids for the bankrupt's stock, held, under the terms of the advertisement, that the bids must be for cash; that an offer of \$100 more than the highest bid is invalid; and that the assignees cannot be compelled to accept the highest or any bid.

Decree of the Vice-Chancellor reversed.

OPINION OF THE COURT, BY McCULLY, J.

THE statement of this case for the purpose of explanation of the matter now before the Court is as follows:

Kennedy & Co. were decreed bankrupt on a petition of sundry creditors, and the defendants, who are the principal creditors, were duly elected assignees. The business of the bankrupt firm was keeping a store or bazaar in Honolulu for the sale of varieties of small wares, with a branch store in Wailuku, Maui. The assignees, with a view to closing the estate and realizing promptly, put out the following advertisement:

"Estate of Kennedy & Co. In Bankruptcy. The assignees are now prepared to receive sealed bids for the stock, book-accounts and general assets of the above estate as a whole. Bids will close Monday, March 9th, at 12 o'clock noon. Any information to aid bidders will be willingly given by the undersigned.

"M. GREEN,

"W. F. REYNOLDS,

"Office of M. Phillips & Co.

Assignees:"

and thereafter came before the Justice who was holding the bankruptcy proceedings with a petition and motion for the confirmation of a sale to Reynolds, one of the above defendants. The

opinion recited below gives an account of the various bids received. The Justice overruled the motion to confirm the sale to Reynolds.

The confirmation of the Court was asked under the provision of Sec. 12 of the Bankruptcy Act of 1884, that assignees may dispose of all property of the bankrupt at either public or private sale, but that private sales shall be valid only upon confirmation of the Court having jurisdiction of the proceedings. Upon the Court denying the motion the present plaintiff brought his bill in equity for a decree requiring the assignees to accept his bid as being the highest regular and valid bid made under the call for tenders.

The first question raised for consideration is of the jurisdiction of the Court in Equity. If the method of advertising for sealed tenders was a "public sale," it did not require the confirmation of the Court in Bankruptcy; if it was a "private sale," why should not the Court have proceeded to confirm the sale to the highest bidder, and why, then, should equity take jurisdiction of matters provided for and within the jurisdiction of another Court. To answer these questions it does not seem to us to be necessary to determine whether a sale by this method is a "public" or a "private" sale. If it should be considered to stand with *viâ voce* auctions as a public sale, then we may remark that while the statute requires private sales to be confirmed, it does not prohibit the confirmation of a public sale if parties concerned seek it, and there might be circumstances which would make such a course desirable. It was only the sale to Reynolds for which the assignees asked confirmation, or rather asked leave to make. They did not submit to the Court the proposition to confirm any other sale. They plainly expressed themselves unwilling to make any other, unless it should be to West on his offer to buy on credit, which the Court would not entertain. They would not make the sale to this plaintiff. It seems to us, then, that it was not within the jurisdiction of the Court in Bankruptcy by its powers of confirming a sale to compel the assignees to make a certain sale. The plaintiff, then, being without this recourse, was left to his remedy in equity upon the jurisdiction for specific performance. The findings and the rulings of the Court in equity were as follows:

1. "The tender by McDonald was presented after 12 o'clock noon of Monday, March 9th. It was endorsed on the envelope,

'Messrs. Green and Reynolds, assignees of Kennedy & Co. Sealed tenders for the assets.' Under the advertised call for bids the assignees might have refused to receive this, as being barred by the time. But they did not refuse it. It was superscribed as a bid, and they opened it at the time, they being in session opening and examining the bids. In the written motion before the Court in Bankruptcy they report this as one of the bids received by them. It must be considered that the objection of being late was waived by the assignees at least.

2. "It seems within the province of this case, as the above motion was introduced, to say here that the bid of \$5,000, in four payments up to twelve months' time, with interest and approved security, could not be considered a bid which the assignees might receive. Their duty is to realize cash with which they may make dividends. Notes would be only the substitution of a new debtor for the bankrupt one. Approved securities may fail. The call for bids not speaking of credit bids, only cash would be presumed, and it would not be fair and equal to permit credit bids to compete on their face figures with cash offers. ^

"The offer of Reynolds to give \$100 more than any other bid cannot be treated as a valid bid. See *Webster vs. French*, 11 Ill., 254, cited in note, page 120, Bateman on Auctions. It stands to reason. If every bid was of this description, what would be the price bid! If there were only one such tender made, among others which specified amounts, the only thing certain would be that every such regular bid must fail. So it is quite needless to consider the other objection, whether, as Reynolds is an assignee, he could become a purchaser by any bid.

3. "The plaintiff's bid being now the highest legitimate bid, what is his right in the premises? The assignees, defendant, say that they are not bound to take the tender of the highest or any bidder. This reservation is not made in the call for bids. That if no bid had been for more than a nominal sum, and altogether incommensurate with the value of the stock they would not be justified in taking the highest. That there was an implied discretion as to the quality of the bids.

"Upon this last point, as this is to be a sale for cash down, there can be no discretion to sell if the cash is placed in hand and to va-

cate a bid that is without a payment. The plaintiff here is met by a refusal to take his offer and has not failed toward payment. He can make the payment. The assignees do not close the contract with him because he cannot pay, but because they now find they can do better.

"Concerning the discretion, power or right to reject the highest and all bids for a merely nominal sum, when no reservation has been made in the call for bids, it may exist. But what are the facts in this case. The real question is not what percentage upon the amount of claims does any bid make, or make to the actual cost of the stock, but what proportion does the bid bear to the best net amount which practically can be realized. The testimony of the two assignees, who are by much the largest creditors, is that in view of the assets they would consider themselves fortunate to receive 60 per cent. Something less than that would be a good realization. This is their valuation based on considerable knowledge of the stock.

"The plaintiffs' tender, \$4,375, is about 55 per cent. of the claims proved. I do not consider that it is grossly inadequate. It is barely under the valuation of the property as per the defendants' testimony. Kennedy has given a higher valuation, which, under the circumstances, I do not accept as realizable.

"Now, can the defendants, under the terms of their call for bids, refuse a fair offer? The general rule of law is that obligations in a contract are reciprocal. Could the defendants hold the plaintiff to his? I think they could, and I think he is entitled to a decree requiring assignment and delivery of the assets on payment of the amount of his bid."

With the holding of the Court below respecting its jurisdiction, and the character and validity of the bids, we agree.

The question of the obligation of the defendants to accept the highest bid, is one upon which we find but little direct authority to guide us. The cases of auction sales are to the effect that the contract with the purchaser is closed when by the fall of the hammer the bid is accepted. The bid may be withdrawn before such acceptance. We have no occasion to consider here the law governing by-bidding and bidding by the auctioneer, for the only thing resembling that, Reynold's bid, has been thrown out, and

we have declined to take notice of sundry proffers of a higher price made subsequently to the opening of bids on the 9th of March.

The case of *Spencer vs. Harding*, 5 English Law Reports, p. 561, was where defendants sent out a circular as follows:

"We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A xx at a discount, in one lot, payment to be made in cash; the tenders will be received and opened at our office, etc."

The Court held that this did not amount to a contract or promise to sell to the person who made the highest tender, but that in the absence of any words to intimate that the highest bidder is to be the purchaser, it was a mere attempt to ascertain whether an offer can be obtained within such a margin as sellers are willing to adopt. The advertisement in the case at bar likewise contains no offer to accept the highest or any bid, as on the other hand it does not reserve the privilege of not accepting any of them. Herein it differs from an open auction when the contract is closed at once by the fall of the hammer accepting the highest bid, or an open bidding-in if there has been a bid reserved, or an upset price. The defendants not having held out that they would accept the highest bid would not seem to be bound by it. The tender or offer must stand as merely such until acceptance has made it a contract. We do not agree with the observation of the Court below that, because the defendants might bind the plaintiff by accepting his offer, he can claim a decree compelling them to accept it, for they do not say that the highest bidder shall be the purchaser. There can be nothing inequitable in limiting the rights of the plaintiff strictly to the defendants' offer, which amounts only to this, that they will receive and consider offers for the property. No one making a tender has a right to expect anything more than what is so offered. Nor will the fact that a fair and not inadequate price is offered bind the defendants to accept it, if they have not held out that they will be bound by the highest good bid.

We therefore set aside the decree made below and dismiss the plaintiff's bill; costs to be divided.

A. S. Hartwell and Jno. Austin, for plaintiff.

R. F. Bickerton, for defendants.

Honolulu, April 14, 1885.

KALIHILIH (w) *et al.* vs. KAINA.

EXCEPTIONS FROM CIRCUIT COURT, THIRD JUDICIAL CIRCUIT.

APRIL TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

A document held to be a deed and not a will, the intent being that the property should pass to the grantee immediately, notwithstanding the use of the word "devise" (hooilina).

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of ejectment, tried at the November Term, 1884, of the Circuit Court of the Third Judicial Circuit, to recover possession of land at Hilo, Hawaii, granted to one Kaulua by Royal Patent No. 2,480.

The bill of exceptions shows that plaintiffs put in evidence the Royal Patent, and proof that the patentee died intestate, and that plaintiffs were his heirs at law, and rested; defendant's possession and demand and refusal being admitted.

Defendant put in evidence of twenty years' adverse possession, also introduced in evidence an instrument whereto said patentee Kaulua and defendant were parties, a translation of which is as follows:

[STAMP.]

"Know all men by these presents that I, Kaulua, of the Island of Hawaii, Hawaiian Islands, concerning my Kuleana, in the Ahupuaa of Ponahawai, Hilo, Hawaii, make known by these presents that I have given, upon consideration, have devised (hooilina), and by these presents I do devise (hooilina) and firmly

bind over (hoopaa loa) to Kaina, and his heirs and grantees, all my rights, foundation rights, right of property in, residence and right of residence, entering upon and right of entering upon, boundaries and right to the boundaries, in this piece of land described as follows: On the north is Naliwahine's premises, on the east is Hauna pond, on the south Hiona's premises, on the west the Government road. Together with everything appertaining or that may hereafter belong to it; the houses and everything else that may be built upon it, and all things necessary to it, the water, the trees, the stones, highways, the paths of ingress and of egress, roads from it, and all the appurtenances. To have and to hold this Kuleana piece of land of mine mentioned above, to Kaina and to his heirs and grantees.

"And in testimony of the above I hereby sign my name and seal this 30th day of July, in the year of the Lord one thousand eight hundred fifty-one.

[SEAL.]

"To Kaina.

"Ponahawai, Hilo, Hawaii.

"Eye witnesses:

his
"KAULUA X
mark.

"WILLIAM MOMONA,
"PUAA,
"KALAKUAIOHO,
"PELEULA."

Defendant claimed that the same was a deed of the land in question from the patentee to the defendant. Evidence was offered to prove the signatures of witnesses thereto, and defendant's counsel requested leave to read the paper to the jury. The Court ruled that said instrument was a deed, and admitted evidence as to its genuineness, and allowed it to be put in evidence and read to the jury. Plaintiffs excepted to said ruling, claiming that said instrument was a will.

The Court charged the jury that said paper was a deed, and not a will, and that defendant was entitled to a verdict, if the jury found from the evidence that the same was genuine, followed by possession under it. The jury returned a verdict for the defendant.

The question raised is whether the instrument is a deed or a will. Washburn, following Lord Coke, defines a deed to be "a writing containing a contract sealed and delivered by the party thereto." 2 Wash. R. P., 553. "A deed takes effect from delivery," *id.*, 578. "A will is a disposition of real and personal property, to take effect after the death of the testator." 4 Kent Com., 500.

We find no words in the instrument indicating that it should take effect and vest in the alienee only after the death of the signer.

It is a peculiarly worded instrument, drafted over thirty-four years ago by a Hawaiian, and contains in the description of the estate to be conveyed many particulars which are redundant and unnecessary, but many of these particulars show decidedly that the estate was to vest immediately. The grantee is to have the "right of residence" upon the land, ingress to it and egress from it. These rights, which vested on the delivery of the instrument, are inconsistent with the idea of a testament which has no effect until after the death of the testator, he having the use of his property meanwhile.

But it is contended that the use of the word "hooilina," which ordinarily means, when used as a verb, "to devise," is appropriate to a will, as a "hooilina" means a "devisee," *i. e.*, one to whom something has been left, as anciently among the Hawaiians property passed to the heir by oral wills. The word also means an "heir." From its etymology and received usage it also means, when a verb, to "put upon" or "pass over to," and in its connection may not mean to *devise* in the sense to pass to one after the death of the deviser.

But the word "give" (haawi) is also used in the instrument in connection with the word "hooilina." Here again Lord Coke says, "If one by deed give lands to another and to his heirs, without saying anything more, and put his seal to it, and make delivery where it is necessary, it is good." 2 Wash. R. P., 611.

We should not be willing to hold that this paper was a will solely because the word "devise" is used, when the whole tenor and effect of it shows the intention of the grantor to pass the

land to the grantee immediately. The deed was delivered and was followed by possession for over twenty years.

We overrule the exceptions.

Kinney & Peterson, for plaintiffs.

E. Preston, for defendant.

Honolulu, April 27, 1885.

ACHEU vs. SUNG KWONG WO CO.

EXCEPTIONS TO RULINGS OF McCULLY, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

There appearing evidence upon which the jury based their verdict, the Court cannot grant a new trial in order that the case may be presented by new counsel with more exactitude, no exceptions having been taken in the Court below covering the points on which a new trial is asked for.

Although damages may appear excessive, the Court will not disturb the verdict if the damages are within estimates made by witnesses.

OPINION OF THE COURT, BY JUDD, C. J.

THIS case before us is on the exceptions by plaintiff to a refusal by the Justice who tried the case, with a jury, to grant a new trial on the ground that (1st) the verdict obtained by plaintiff is contrary to the evidence given at the trial, and (2d) the damages awarded by the jury are excessive.

It is claimed, on behalf of the defendants, that the facts of the case are as follows :

“The defendants occupy a tract of land of about nineteen acres, adjoining the mauka side of the Government road in Waikiki, between the lands of Pau and Kaluakau. They cultivate bananas chiefly. Their land is surrounded towards the southerly and easterly sides by a high bank of sods grassed over.

“The plaintiff occupies land in Kaluakau, adjoining the de-

fendants at the said bank. He cultivates bananas, potatoes, melons, etc. He was a partner of defendants' till about June, 1883, when he sold out. He leased the premises by him occupied about February, 1884, and soon after cut and deepened a ditch on the westerly side of his land, running from the main auwai of Kalia to the bank above mentioned, and began to cut away the said bank, so as to permit a free passage of water through, at the place where there had been a cut through before, but not so deep. The defendants stopped this, and effectually banked up the opening, preventing the passage of the water. This was followed by flooding of the plaintiff's land, and the destruction of a portion of his crop."

It appears from the record there was competent evidence to support the plaintiff's claim. But it is urged by defendants that if an easement had been acquired by the owner of the plaintiff's land to have the water pass from it through a bank on defendants' land, the easement of drainage can only be claimed as acquired, and would not sustain a right to drain off the water through the ditch lately deepened and enlarged by plaintiff. And the defendant claims that the plaintiff has shown no prescriptive right to the easement of drainage through the deepened and enlarged channel.

It must be borne in mind that this Court is not now trying the case upon its merits. If it were, we should have to consider the nature and capacity of the draining ditch during the period when it is claimed the right to its use accrued, also whether its enlarged capacity, and the presence of a larger body of water in it, whose escape was prevented by defendants, occasioned the damage, and whether the changed character of the cultivation of the plaintiff's land from kalo to bananas, etc., required more drainage and drier land, and whether the damage to their style of crop would not have occurred, even if the old and unaltered drain had remained open.

But no position of this character was taken at the trial, so that the Court could instruct the jury properly upon these matters. It is quite possible that new counsel, in the light of fresh investigation, can find facts in the case which, if an instruction from the

Court had been asked, would have drawn a different verdict from the jury.

It does not appear what instructions were asked for by the defendants. Certainly no exceptions were taken to the instructions that were given, and we must take it that they were satisfactory to the defendants.

The defendants had their opportunity, when before the jury, to make their case, and having done so, and there appearing evidence upon which the jury based their verdict, we cannot grant a new trial in order that the case may be presented with more exactitude.

As to the ground of excessive damages. They may appear so to the Court, but the amount of damage found by the jury was within the estimate made by the witnesses, and for this reason we are not at liberty to disturb the verdict.

Exceptions overruled.

A. S. Hartwell, for plaintiff.

W. R. Castle, for defendants.

Honolulu, May 1, 1885.

G. N. WILCOX vs. A. G. ELLIS.

APPEAL FROM DECISION OF THE CHANCELLOR.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A sale of shares of stock set aside for the fraud of the seller; it appearing that the seller made false representations as to the value of the stock, intending that the buyer should act upon them, and the buyer acted upon them, although he could, by diligent enquiry, have ascertained that they were untrue.

OPINION OF THE CHANCELLOR APPEALED FROM.

THIS is a bill to declare fraudulent and void a sale made by defendant to plaintiff of sixty shares of the capital stock of the Ho-

nolulu Ice Company, a corporation under Hawaiian law, at \$70 per share, and also for an injunction to restrain defendant from taking out an execution upon a judgment for \$4,200 obtained by the defendant against the plaintiff at the last July term of this Court for the purchase money of this stock.

The bill charges that the fraud was accomplished by misrepresentation and by the concealment of material facts. The misrepresentation is charged to be statements made by defendant that the stock was good, marketable stock and a first-rate investment at the price offered, and that the President of the Ice Company, S. G. Wilder, who was the principal owner of its stock, held it at par (\$100) and refused to sell for less.

The concealment is charged to be of the fact that the stock was unsaleable, and was by reason of an expected competition in the ice business of greatly less value than par.

Taking up first the second point, I think it is proved by the evidence that at the time of the sale of the stock, April 10, 1884, Ellis knew that the new ice company was about to be formed. This is clear from the evidence of Mr. Sass, the projector of the company, who says he told Ellis all about it just previous to his going to San Francisco, about the last of March. Also that Wilcox did not know of it until he heard of it from Mr. W. O. Smith, on April 10th, immediately after his purchase of the stock.

Was Ellis under any legal obligation to disclose this information to Wilcox? By the authorities he was not. Chancellor Kent's statement of the law in this regard is as favorable to the plaintiff as any. He says: "When, however, the means of information relative to facts and circumstances affecting the value of the commodity, be equally accessible to both parties and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not necessary to the validity of the contract. There is no breach of any implied confidence that one party will profit by his superior knowledge as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence, because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for

himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill and diligence. The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent Com., p., 484.

The possibility of competition in the business of ice-making is one of the chances to which all business ventures are subject. Mr. Sass had caused to be published in the *Daily Bulletin* of 31st March an extended account of it, ending with the statement: "Mr. Sass leaves by the *Alameda* to purchase the necessary machinery."

Pomeroy says (Sec. 904, 2 Pomeroy Eq. Jur.) that a broader duty to disclose material facts rests upon the vendor than on the vendee. "In ordinary contracts of sale where no fiduciary relation exists, and where no confidence, expressed or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arm's length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine above stated applies; no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment."

There was no fiduciary relation existing between Ellis and Wilcox. Nor is there any evidence that Wilcox expressly reposed confidence in Ellis in this transaction. So far from this being the case, Wilcox says he was bored by Ellis' importunity and that he made the offer to get rid of him, not expecting that it would be taken. The parties were at arm's length. Wilcox was not seeking investments, and was, so to speak, surprised into the sale.

Mr. Justice Story says (2 Eq. Jur., Sec. 204) in speaking of undue concealment or *suppressio veri*, "It is not every concealment even of facts material to the interests of a party which will entitle him to the interposition of a Court of Equity. The case must amount to the suppression of facts which one party, under

the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent." And in Sec. 205: "The question is not whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also that there should be some obligation on the party to make the discovery." Sec. 207: "The true definition, then, of undue concealment, which amounts to fraud in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right not merely *in foro conscientiae* but *juris et de jure* to know."

And I gather from all the authorities that a sale of goods is not rendered invalid if the vendor has actual knowledge from private sources of facts or events—which are called extrinsic circumstances—not known to the other party, which materially affect the price of goods. Story says where the intelligence is not equally accessible to both parties, equity will not relieve, if it is not a case of mutual confidence. *Id.* Sec. 149. See *Laidlaw vs. Organ*, 2 Wheaton, 178, and *Mathews vs. Bliss*, 22 Pick, 48.

The rule, as I have expressed it, is subject to qualification; for if there be any fraudulent suggestion or representation, then the transaction becomes tainted with fraud.

On the ground of undue concealment, therefore, I think the bill fails.

In regard to the statements by Ellis, that it was good, marketable stock, etc., I should say that this was a mere matter of opinion, and as such is not relievable in equity, where, as in this case, the parties were dealing with each other upon equal terms.

I pass now to the principal allegation upon which relief is asked for.

Wilcox testified that Ellis, after expatiating on the value of the stock, said that Wilder considered it a first rate investment, and would not sell at less than par. He spoke of him as being President (of the company) and holding most of the stock. He said also that he would not have risked the offer he made of \$70 per

share, if he had known that Wilder's reason for refusing to sell at par was that he would not cause others to lose by him.

Mr. Wilder testified that he had frequently stated that any stocks he was holding that were good he should keep, and if he knew a stock was not good he would not stick his friends with it, and this applied to the stock in the Honolulu Ice Company.

Mr. Ellis, in his answer, denies that he said to Mr. Wilcox that Wilder held his stock at par and refused to sell for less, but says that he answered Wilcox's inquiry as to whose the shares were, that they were Foster's, and Wilcox asked: "Are you not selling for Wilder, and do you not think I could buy of Wilder for less than \$85?" Ellis replied that he offered to sell for Wilder, but that Wilder was unwilling to sell for less than par.

Mr. Wilder says further that he never offered to sell any of his shares in this company. "Don't remember if Ellis offered to sell any for me. He may have asked me if I had any for sale. I have never sold any or offered any for sale."

It seems to me that the inference from Mr. Wilder's testimony is not that he would not sell for less than par because the stock was then worth at least par. He was unwilling to sell at all, while the enterprise was in a condition of uncertainty. And I think Mr. Ellis used the language attributed to him by Wilcox, and that he intended to convey the idea to Wilcox that Wilder considered it of that value, and thus to induce Wilcox to purchase. Mr. Wilder says that if the opposition started, the stock in his company, owing to the limited demand for ice in this community, would be of no value as an investment, but without the opposition it would pay say 10 per cent.; that he had doubts as to the starting of the new company, until Mr. Sass returned from California with his machinery, for he thought no man would be foolish enough to start a new ice machine here.

Pomeroy says (Sec. 876) a misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form, as a statement of fact, as distinguished from a mere opinion. (2) Its purpose of inducing the other party to act, the general presumption being that a misrepresentation has such a design. (3) Its untruth. (4) The knowledge or belief of the party making it. (5) The effect of the misrepresentation, *i. e.*,

the belief, trust and reliance of the one to whom it is made. (6) Its materiality. And (under 5) the party must be justified in relying upon the representation. Here the party is not justified in relying upon the representation, if he actually resorts to the proper means of ascertaining the truth, or when, having the opportunity of making such examination, he is charged with the knowledge he might have had, if he had prosecuted it with diligence, or when the representation is concerning generalities equally within the knowledge or means of acquiring knowledge possessed by both parties. But where the representation is concerning facts of which the party has, or is supposed to have knowledge, and the other party has no such advantage, then he is justified in relying upon the statement.

I find a note to Benjamin on Sales, Sec. 430, as follows: "Mere statements of a vendor, either of real or personal property, not being in the form of a warranty, as to its value, price which he has given or been offered for it, are held to be immaterial," citing:

Medbury vs. Watson, 6 Met., 259; *Brown vs. Castles*, 11 Cush., 350; *Veasey vs. Doton*, 3 Allen, 381; *Cooper vs. Lovering*, 106 Mass., 79; *Mooney vs. Miller*, 102 Mass., 217; *Williams vs. Randall*, 63 Me., 81; *Comer vs. Perkins*, 123 Mass., 431. "But the utmost limit of this rule has been reached in applying it to statements of the price paid by the person himself."

In this note a leading case in Massachusetts, *Medbury vs. Watson*, 6 Met., 246, is incorrectly stated as an authority to sustain the view that an action for false and fraudulent representations as to the price paid by a third person for the property in question, can be maintained. A careful reading of the case will show that an action of trespass on the case was brought, not against the vendor, but against a third person, who made the false representations, and the Court say that "naked assertions by the vendor, though known to be false, are not actionable. When a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, or has refused so much for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable. They are the mere affirmations of the vendor, on which the vendee cannot safely

place confidence, and will not excuse the neglect in not examining for himself and ascertaining what the facts are, and what credit is to be given to the assertions." This is qualified later on, and the Court say that "fraudulent misrepresentations of particulars in regard to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions *gratis dicta*, and are actionable."

In *Cooper vs. Lovering*, the Court say, to support an action of deceit, the misrepresentation must be of a material fact, not within the observation of the other party. The latest Massachusetts case I have seen is *Homer vs. Perkins*, 124 Mass., 431. The Court say, if the representation was a mere affirmation or expression of opinion in regard to the value of the property he is attempting to sell, these can never be safely relied upon by the other party. But if it was intended to be the statement of a fact, to be understood and relied upon as such, the action would lie. Citing *Manning vs. Albee*, 11 Allen, 520, where a false representation was made, not only as to the value of the bonds offered, but also as to the sales of such bonds in the market at a certain price, appearing by a public list of sales of stocks, which was exhibited as actually having taken place, and the action was maintained. The Court say in this case that "the representation was one which the plaintiff is not shown to have had equal means of knowing the truth or untruth of, and on which he might without imputation rely."

In *Mooney vs. Miller*, Chapman, C. J., says: "If false representations relate to material facts not within the observation of the opposite party, and are made with intention to deceive, they are actionable; but if the truth can be ascertained by ordinary diligence they are not actionable."

In New York State the law is similarly held. *Miller vs. Barber*, 66 N. Y., 567. Judge Folger says: "The representation of the value of the invention was connected with a false representation of an extrinsic fact calculated to impose upon the plaintiff, to put him off his guard, and to induce him to give credit to the representation of value. It had the effect it was designed to have. He relied, in taking stock, in part upon the supposed

judgment of other persons who, as he was falsely informed, had taken a stock in the company.

This case bears a close resemblance to the one at bar. Ellis represented that Wilder, the President of the Ice Company, and principal owner, would not sell his stock for less than par, meaning to influence Wilcox to buy upon Wilder's judgment of the value of the stock that it was worth par, whereas Wilder would not sell at all. In the New York case the seller mentioned the names of persons who had taken stock in the company; these had allowed their names to be used as subscribers for stock, and had given notes for the amounts subscribed for, upon the secret agreement that the notes should thereafter be given up without payment. No exercise of diligence on the buyer's part would be likely to reveal the fraud, for the conspirators would not disclose their fraud to the intending buyer. Whether it was Wilcox's duty to make inquiries of Wilder to ascertain whether Ellis' statement was true or not is the remaining difficult point to be decided.

It will be noticed that in many of the above quoted cases the Court say that "the fact misrepresented must be one which the buyer has not equal means of knowing," or a fact "not within the observation of the other party," or a fact which could not be verified "by the exercise of ordinary diligence," etc.

The leading case on misrepresentation in England is *Attwood vs. Small*, 6 Clark and Finnelly (House of Lords). Lord Lyndhurst says: "Where representations are made with respect to the nature and character of the property, which is to become the subject of purchase, affecting the value of that property, and those representations turn out to be incorrect and false, to the knowledge of the party making them, in a court of equity a foundation is laid for setting aside the contract which was founded on a fraudulent basis." He quotes from *Dobell vs. Stevens*, 3 B. & C., 623. Here the purchase was of a public house. A false representation was made by the vendor with respect to the extent of the custom, with respect to the quantity of the beer that was drawn during a certain period. The books were in the house; it was part of the case that the purchaser might have had access to them if he thought proper; but notwithstanding that circum-

stance, it being proved the representation was false, the action was sustained.

Lord Wynford says, on p. 502, *id.*: "I am aware that if a person chooses to trust to the representations, and does not make any inquiry, that reliance will be sufficient to make out a charge of false representations as to set aside the contract." If the party thinks proper to inquire, etc., it will be otherwise.

Judge Cooley on Torts, p. 499, says: "Where one in selling personal property makes positive statements of material facts upon which the other relies, the vendor is held to the truth of the representations," etc. Judge Cooley, however, admits that there are cases to the contrary.

In *Holbrook vs. Connor*, 60 Me., 578, it was held, by a bare majority of the Court, that false and fraudulent representations to a purchaser of the value of lands, as to the price he paid for it, etc., are not actionable, because the purchaser is not justified in placing confidence in them.

So, also, in *Bishop vs. Small*, 63 Me., 12: "Misrepresentations either as to what a patent right cost a vendor, or was sold for by him, or as to offers made for it, or profits that could be made from it, etc., are not actionable."

When it is considered that these representations, not being specific, were not capable of being verified by the intending buyer by any inquiry he might make, I think the case is not against the view of the English case of *Attwood vs. Small*, that if the representations be relied upon it might be the foundation of an action.

The Supreme Court of Michigan holds unequivocally that "when a person sells his property upon the positive statements of another of facts, and those facts turn out to be falsely asserted, he is damaged by the falsehood, and the false assertion has all the effect of actual fraud." *Stone vs. Covett*, 29 Mich., 359.

In Connecticut, *Ives vs. Carter*, 24 Conn., 391, the Court held that "a representation of a vendor that N. had offered a certain sum for the property, and stood ready to give it, if the other party purchased, was directly calculated to affect the value of the property, and supported an action." Here there is no qualification made, and yet the purchaser might have ascertained from N. if the representation was true.

Upon a careful review of such cases as I have been able to find, I think the better doctrine is that where the false representation of a material fact, as distinguished from a mere opinion, is made to a proposed purchaser by the seller, with the intention that he shall act upon it, and he in fact does act upon it, to his injury, the contract of sale can be set aside in equity, even though the purchaser could, by diligent inquiry, have ascertained whether the representation was true or not.

Having arrived at this view of the law, I think the relief prayed for ought to be granted.

Decree accordingly.

Honolulu, March 6, 1885.

OPINION OF THE FULL COURT, BY AUSTIN, J.

The principles which govern this case have been very fully and clearly discussed by the Chancellor. After carefully examining the testimony taken before him, we see no reason to dispute the facts as found by him, and we shall only consider the effect of the new evidence given by Mr. Dole.

The counsel for defendant says: "On Mr. Wilcox's own statement at the trial at law, he cannot now recover. He swore that he did not consider the offer a *bona fide* one, and that he made it merely to get rid of Ellis; and in this suit his evidence is that he considered Ellis a bore, and wanted to get rid of him. That is utterly inconsistent with his present claim that he made the offer because beguiled and misled by Ellis, trusting implicitly in the seller's talk made by Ellis." Even if these statements of fact be true, we do not think they warrant the counsel's conclusion.

On the first trial, other proof than that of Wilcox was given, and upon the whole proofs the jury found against Wilcox, and held him to have bought the stock. And he now swears that all he did say and do towards a purchase was said and done because he was deceived and cheated by the concealments and misrepresentations of Ellis; and that thereby he became liable on the judgment at law. If that judgment stands, because Ellis deceived and cheated Wilcox, as alleged, then the plaintiff can recover here.

Upon the question of concealment, we wish to refer to some facts and views not mentioned below. In his talk with Sass, on March 31st, Ellis was told that Sass and others intended to start a new iron company, and replied: "Start anything but a new ice company. Foster has lost \$14,000 and Wilder \$40,000 in ice." Evidently Ellis considered that new ice works would be a fatal blow to the stock he was then offering for sale, and knew how disastrous competition had been in the past, even of only two companies. Wilder swears that the demand was limited; that, with opposition, the stock was dead as an investment. Honolulu was not like a large field in a great city, where the demand was comparatively unlimited. This was well known to Ellis. Doubtless Wilcox knew this difference, and the fatal effect of any competition; but he did not know, as Ellis did, what Sass had said, and that, on April 1st, Sass left for San Francisco. On April 10th, when Wilcox bought, Sass was in San Francisco. Wilcox could not then interview him. Ellis knew this, and had strong reason to believe that Sass had gone to buy machinery to erect works which would destroy the stock as an investment, and render it almost worthless. Knowing this, he said nothing. His opportunity to know this, from the talk with Sass and his subsequent departure, was greater than Wilcox had at the time of the sale, and yet he was silent. A newspaper article which might be false or exaggerated, was different from a personal interview with the promoter of the new enterprise. Evidently Ellis believed Sass meant to buy machinery. On March 25th he offers stock at \$85; he says on April 10th he snapped at an unwilling offer of \$70, and the broker, Smith, declared to Wilcox it was not then worth more than about \$40.

In view of the condition of the market and the scarcity of the demand for ice, and the fatal result of competition, and of Ellis' talk with Sass and knowledge of his acts, we think that Ellis, in good faith, should have told Wilcox all he knew, in order to bring himself within the doctrine laid down by Kent, as quoted by the Chancellor as follows: "When, however, the means of information, relative to facts and circumstances affecting the value of the commodity, be equally accessible to both parties, and neither of them does or says anything tending to

impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not necessary to the validity of the contract." 2 Kent 484.

We think also that such fatal competition as another company was supposed to bring, good faith required to be disclosed. It was not ordinary competition; it was destruction. A mortal disease of the stock was threatened and imminent.

Upon the allegation of fraudulent representations, we think the findings of the Chancellor should be sustained.

The defendant's counsel claims that the representations should be taken to be made March 25th, when actually made, and not as of April 10th, when the sale occurred. We think this is an error. If, on April 10th, Wilder did not hold at par, as on March 25th, Ellis was bound to say so. From his silence Wilcox had then a right to assume that Wilder still held the stock at par. The sale and silence were equivalent to a reassertion that Wilder so held, and that the situation remained unchanged. Wilcox bought, believing that Wilder would not then sell for less than par. If this be so, then the false representation and the concealment were as though contemporaneous, and the language of the Chancellor's opinion becomes applicable wherein he says: "The rule as to concealment, as I have expressed it, is subject to qualification, for if there be any fraudulent suggestion or representation, then the transaction becomes tainted with fraud." If Ellis, on April 10th, had said, "Wilder will not sell for less than par," it would have been an actionable concealment to have suppressed the facts which Ellis knew about Sass and the new company, and which doubtless convinced him that the shares could not be held by anybody at par, but should be held at a very low figure. If Ellis said that Wilder held at par, he must have meant to give the idea that he so held the stock because it was worth par, and not because its value was uncertain, and he would not therefore sell, to possibly "stick his friends" at any price. The statement that Wilder held at par, or would not sell at par, may have been true in the letter, but was not in the spirit. Had Wilcox known the actual facts as to Wilder's stock, this litigation would never have been begun.

"Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." Story's Eq. Jur., Vol. 1, Sec. 193. *Sharp vs. Mayor*, 40 Barb. 256.

The opinion below establishes that there was no duty on Wilcox to inquire of Wilder. He had a right to rely on Ellis' statement. The evidence of Mr. Dole of what Wilder told him as to the value of the stock, does not change the situation. Probably Wilder then thought that there would be no opposition company. The question how Wilder held his stock was not talked of to Dole.

The decree must be affirmed.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, May 23, 1885.

See *Ellis vs. Wilcox*, ante, 236.

JOHN McKEAGUE, by his Guardian, T. A. LLOYD, vs. A. KENNEDY.

APPEAL FROM DECISION OF THE CHANCELLOR.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A sale of a sugar plantation, at an exaggerated price, to a person whom the vendor knew to be of impaired mind, set aside.

Decree of the Chancellor affirmed.

OPINION OF THE FULL COURT.

In our view, the law as held by the Chancellor in his carefully written opinion in this case, is indisputable, namely, that if it appear that advantage has been taken of a person of weak or

impaired mind to consummate with him an unconscionable bargain, equity will set it aside. We have very carefully endeavored to view the transaction, in accordance with values and the prospects of sugar plantation property at the time of the sale and mortgage in question. We intend to guard against now reversing a bargain which might have been fair at the time, but which the subsequent course of business has proved to be disadvantageous. But bearing this in mind, under all the circumstances and facts of the case, as stated in the opinion of the Chief Justice, and as we further find them in the record of evidence, we must find that the transaction between the parties was then unconscionable. The effect of the evidence is to convince us that Kennedy sold for a very high price his interest in a property which from the beginning had yielded him no dividends and placed him under considerable liabilities. He had previously sold a quarter for the nominal sum of \$15,000, of which it may be said he had never been paid any part, for \$10,000 was set against this as being the amount which he owed the plantation, barely upon McKeague's statement of that amount, and the remainder was settled by note, which remained unpaid, and was added to the amount of the mortgage given for the second quarter, the sale of which we are now considering. Setting aside the valuation of the property, as given by the defendant's testimony, the preponderance of the evidence strongly sustains the fact that the valuation that his share was sold for was grossly exaggerated.

We are equally of opinion that McKeague at that time was not in a mental condition suitable for important business transactions, and that Kennedy was well aware of this.

The decree of the Chancellor is affirmed.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, May 23, 1885.

DECISION OF THE CHANCELLOR, APPEALED FROM.

This is a bill in equity to cancel the mortgage made to defendant by John McKeague. The essential allegations are that it appears by an agreement, dated 11th June, 1875, that plaintiff and defendant were partners, and that the Heeia Sugar Plantation

was owned by them in equal shares; that defendant was then owing plaintiff \$10,000, and agreed to pay the same in six months, and in default of such payment would assign to plaintiff one-fourth of the plantation and of its profits. That, on the 20th February, 1879, defendant conveyed to plaintiff, for the consideration of \$15,000, one undivided fourth of the plantation, subject to plaintiff's assuming a like share of the debt on account of the estate, which then amounted to over \$70,000. That, on 1st July, 1881, plaintiff and defendant made a mortgage to H. Macfarlane & Co. to secure payment of \$20,000, and further advances up to \$40,000 in all. That at this last date the partnership of plaintiff and defendant owed H. Hackfeld & Co., on account of the plantation, \$41,704 70, secured by a mortgage dated 30th September, 1879. That on 24th September, 1881, the defendant sold to plaintiff his remaining undivided fourth of the plantation for \$50,000, and plaintiff gave defendant a mortgage of the plantation to secure payment of \$54,500, as evidenced by promissory notes as follows: \$2,500 in nine months: \$2,500 in twelve months: \$5,000 in two years: \$40,000 in five years thereafter, with interest thereon at 9 per cent. per annum. (This sum of \$54,500 was purchase money, \$50,000, and balance of sale of the first one-fourth, \$4,500).

That on the 30th June, 1882, plaintiff sold the plantation to the Heeia Sugar Plantation Company, a corporation. That on the 2d February, 1884, plaintiff, by his guardian, brought a bill in equity against the Heeia Sugar Plantation Company and M. Neisser, its agent, which resulted in a decree annulling the conveyance to the corporation, and declaring it void on the ground of fraudulent representations and mental incapacity of the plaintiff. That at and long before the date of the mortgage to the defendant (24th September, 1881), the plaintiff was in a condition of mental incapacity for the transaction of important business, and did not know or comprehend the nature and effect of his act in making the mortgage and notes, and that the consideration for the mortgage was grossly disproportioned to the value of the property, and that the plaintiff was induced to make the mortgage by the suggestion, contrivance and undue influence of defendant, who took an unfair and dishonest advantage of the plaintiff's mental

incapacity, well knowing the circumstances, and that the total liabilities assumed by the plaintiff was then over \$70,000, and which he was utterly unable to pay. The plaintiff offers to reconvey the said one-fourth of the plantation to the defendant on his repaying plaintiff \$14,000, and interest received by him from the plaintiff, and reimbursing plaintiff his share of the expense, and assuming his share of the liabilities.

The defendant's attorney in fact, Samuel M. Damon, answered October 14, 1884, and the defendant, who is a resident of Belfast, Ireland, also made answer, received here and filed on the 9th February, 1885. These answers fully detail the business relations of plaintiff and defendant, showing that in 1859 plaintiff, who is defendant's nephew, was started by defendant in business on a small farm in Nuuanu Valley, and McKeague started a sugar plantation on this farm, and in 1865 defendant joined him in it, and a year or two later they commenced the Heeia Plantation, and moved the machinery thither, and carried the plantation on. No written articles of copartnership were made, but the parties held equal undivided moieties. In the year 1870, the parties settled their rights by a deed, and defendant went to Ireland, and returned in 1871, and went again to Ireland in 1872, and returned to this Kingdom in 1878. That in that year the parties made a settlement of their affairs. That during all this time McKeague had the sole management of the plantation, and kept no partnership accounts, and defendant had no means of knowing whether he owed McKeague the \$10,000, as claimed by him, but that he took McKeague's word for this, and completed the transaction of the sale of the first one-fourth, as set forth in the bill of complaint. That in 1880 defendant again returned to Honolulu, and endeavored to sell his remaining fourth, because, although defendant had advanced several sums of money from time to time to carry on the plantation, he had never received any dividend or share of profits; but that McKeague had been drawing out such moneys as he required for his personal use, besides a salary, which amounted in two years to about \$18,000, for which McKeague could give no account. The defendant then proposed to sell his remaining fourth; that defendant said he would give time to pay the balance of the purchase money, if \$10,000 was

paid down, and that McKeague said he would not give more than \$50,000 for the remaining one-fourth, and that defendant had not mentioned any price to him, but subsequently defendant had told plaintiff he would take the sum offered, and the transaction was completed. The answer avers that the sum of \$50,000 was a fair and honest price, admits the payment of \$10,000 of the purchase money, and that \$40,000 is owing, with over a year's interest.

In regard to the mental condition of McKeague, the answer admits that McKeague had met with an accident between 1878 and 1880, which affected his health, and that in 1880 defendant observed a change in McKeague's mental and bodily condition, but that in 1881 McKeague had gone to San Francisco for a sea voyage and on his return "he was decidedly a great deal better in body and mind and was like what he had formerly been," and that during all the negotiations McKeague was perfectly cognizant of everything and competent to judge for himself. The allegations in the bill as to the mental incapacity, undue influence, and that the consideration in the mortgage is grossly disproportioned to the property, etc., are denied.

Without referring to the evidence in detail, embracing as it does much that was taken and by me fully discussed in the case of *McKeague vs. Neisser et al.* (May, 1884, not reported), I am of the opinion that McKeague was at the time of the transaction between him and defendant, which resulted in the mortgage now attacked, in a weak condition of mind, rendering him incapable of passing correct judgment on important business matters.

The defendant admits that he had observed in 1880 that McKeague was weakened in both mental and physical condition, but that in 1881 he had recovered as the result of a voyage to San Francisco and back.

It is in evidence that Dr. Kennedy was in 1881 residing at Heeia, where he held a commission from the Board of Health; that he frequently made remarks about McKeague's condition, once stating, when he observed McKeague mounting his horse with great difficulty, that he seemed to be paralyzed on one side of his body and head, and that if McKeague did not settle affairs satisfactorily with him he would have him put into an insane asylum and get a competent man to manage the plantation; that

Kennedy was dissatisfied with McKeague's management of the plantation, and even mentioned the name of a desirable successor to the management.

These witnesses say that the only difference in McKeague's condition after his return from San Francisco was that his complexion was fairer, that his mental condition was unchanged—was as it had been since the fall from his horse.

I must consider Kennedy as having full opportunities of judging of McKeague's weak mental condition, and that he, being a physician of experience and having had a long personal acquaintance with McKeague, who was not only his nephew but his partner, did have actual knowledge of his condition. He says he was anxious to close out his interest and return to Ireland, because he could get no dividends or profits from the plantation. He even had to put into the mortgage now under contention, to be secured, the sum of \$4,500 balance of former sale of one-quarter interest. This McKeague had been unable to pay him, and I think this is inconsistent with his answer and deposition that \$50,000 was a fair and honest price for one-quarter of the plantation and that the whole plantation was worth from \$200,000 to \$250,000.

But the plantation then owed \$66,948 13 and McKeague undertook to bear this in addition to the \$54,500. This would put the plantation at a valuation of \$271,348 13. It was assessed in 1881 at \$135,310. Others testify that it was worth from \$175,000 to \$200,000. Mr. Henry Macfarlane says that he thought at the time that the price McKeague paid was "ridiculous." The plantation was run down, and he told McKeague it was a poor time to buy Kennedy out, and advised him to let him alone, and used all the arguments he could. McKeague said he would not buy, but bought without his knowledge. He says that in June, 1882, when Ross took charge, the plantation was worth about \$125,000. It is remarkable that Kennedy was willing in 1879 to sell (three years after the Treaty of Reciprocity with the United States went into effect) at the rate of \$60,000 for the plantation, and yet he considers the price he obtained two years later, at a rate of \$271,000, was fair and honest.

There is evidence that in the year 1881 all plantation stocks and investments were high and the prospects of the sugar interest

very promising. And we have the evidence that about \$200,000 was expended on the place between April, 1878, and June, 1881, and of this about \$100,000 was in a new mill and other permanent improvements, and that in those years all but about \$50,000 had been paid off from the crops. But it must be borne in mind that, though the mill was new and good and the crop at the time of McKeague's fall from his horse was a good one (about 500 tons), he neglected cultivation after that, and the plantation had run down so that it required great expenditure to bring it up again after Captain Ross took the management.

I think that Kennedy was insincere when he told Mr. Cecil Brown that he did not care to sell to McKeague. His answer and deposition show that he was anxious to get out of a matter that paid him nothing and burdened him with liabilities, and I am led by all the facts in the case to the conclusion that he took an unconscionable advantage of an enfeebled intellect to secure for himself a mortgage for an amount grossly disproportionate to the value of the property, taking everything into consideration.

That McKeague was greatly influenced in consenting to this bargain by the contemporaneous, alluring and fraudulent representations of Neisser, I cannot doubt. Of these negotiations Kennedy had some knowledge, for he says he told McKeague "to have nothing to do with Jews," when McKeague told him he was going to sell out to a California company for \$1,000,000.

In a case decided by me July 3, 1884, *Apahu vs. Feary*, not reported, I had occasion to define the principles upon which equity will interfere where great advantage is taken of a weak intellect to secure an unconscionable bargain with a grossly disproportionate consideration. In such cases imposition or undue influence will be inferred.

I find such circumstances in this case, and am of the opinion that the mortgage under consideration should be cancelled.

Decree accordingly.

A. S. Hartwell and W. R. Austin, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, March 12, 1885.

BECKY K. KAAI *vs.* W. M. MAHUKA *et al.*

APPEAL FROM DECISION OF THE CHANCELLOR.

APRIL TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

Proceedings before the Land Commission cannot now be re-examined; approving *Kukiiahu vs. Gill*, 1 Hawn., 54, and *Bishop vs. Namakalaa*, 2 Hawn., 238.

Land Commission Award 721 is headed "Mahuka and Kaai," but the land is awarded to "Mahuka;" held there is no trust in Mahuka in favor of Kaai.

Decree of the Chancellor, dismissing bill, affirmed.

OPINION OF THE FULL COURT.

THE law in this case, respecting the examination of proceedings before the Land Commission, has been placed by this Court, in the cases of *Kukiiahu vs. Gill*, 1 Hawn., 54, and *Bishop vs. Namakalaa*, 2 Hawn., 238, on a foundation which cannot be disturbed. Every year which passes increases the force of the reason which demands that the adjudications of the Land Commission be not now re-examined.

No evidence is offered in the case before us which justifies us in relaxing this rule. The law and the facts are amply set forth in the opinion of the Chancellor, which we affirm, herewith subjoined.

The decree is affirmed.

S. B. Dole, for plaintiff.

E. Preston, for defendant.

Honolulu, May 23, 1885.

OPINION OF CHANCELLOR JUDD, APPEALED FROM.

This is a bill in equity to declare a trust.

It appears that in 1847, one Mathuseloh Mahuka petitioned the Land Commission for an award to him of a house lot in Honolulu, lying between King and Merchant streets, east of Fort

street. The Commission took evidence, and awarded the land to him by award No. 721. The heading of the award is "Mahuka and Kaai," but the land is awarded to "Mahuka."

In 1849 the land was appraised to ascertain the amount to be paid in commutation of the Government rights therein. The written report of the appraisers designates the land as "Mahuka's house lot." A resolution of the Privy Council of that year is produced, fixing the Government commutation at \$50, speaking of the land as Mahuka's; and on the 20th of November, 1849, the King signed a Royal Patent for this lot to Mahuka, his heirs and assigns.

It is in evidence that Mahuka used it as a residence, having several houses upon it, and later bought the adjoining lot, on which was a large house, and he then threw the two places into one, and continued to use the lot as a residence. He died in 1881, and the defendant is his son and heir.

It also appears that Mahuka had a brother named Kaai, who died in 1859, and left a son named Simon K. Kaai, who died in 1884, leaving the plaintiff, his widow and sole devisee. It is in evidence that Kaai, senior, came from Waikapu and lived on this lot for a few years with his brother Mahuka, until he was taken to live as a servant with Prince Lunalilo, at Pohukaina, now a part of the Palace premises. His son Simon lived some of the time on this lot, but his residence was mainly at the Fort, and later at Oahu Prison, where he was under-jailer. After this he removed to Kona, Hawaii, and the latter part of his life was spent at his residence at Kapalama. While a member of the Legislature in 1874-6 he lived, while the session lasted, on the premises in question, and was accustomed to entertain his fellow Representatives there. There is no evidence that Kaai senior ever claimed an interest in this land from Mahuka, nor did Simon claim it during Mahuka's life time. After Mahuka's death he was appointed administrator, and told the widow that he had an interest in the land. In 1883 he included an undivided half interest in this land in a mortgage.

There was introduced in evidence, contrary to the objections of counsel for defendant, the evidence before the Land Commission. It is as follows:

"Claim 721, Mahuka, February 14.

"Hoomeapule sworn: This place is in Honolulu, bounded Waikiki side by Kalaimoku's land; mauka by Broadway; Ewa by lot of S. Reynolds, got from Swinton; makai by Merchant street. It is inclosed, with five houses. Claimant lives there, and all living on it are under him. His father and uncle (Malawai and Keau) occupied it in the time of Kamehameha I. When they died it fell to claimant, with his brother and sister, who is now dead.

"John Hall sworn: "I know this place, and the bounds are the same as those described. (Claimant admits his brother Kaai to have equal rights.) I do not know of any counter claim or other claimant than Kaai, claimant's brother."

It is urged that the Land Commission was a court of competent jurisdiction, and that the evidence upon which this judgment was based cannot be introduced to controvert their judgment. Soon after the dissolution of this Commission, the Supreme Court admitted the evidence taken before the Commission to show that the award as recorded was not the same as agreed upon by the Commission, and that the clerk had made an error in recording the judgment of the Commission. "The record of the Land Commission," say the Court, "was admitted for the purpose of corroborating the evidence of error in the record, or error in the transcript." This was in the case of *Bishop vs. Namakalaa*, reported in 2 Hawn., 238, decided in 1860, only nine years after the adjudication of the Land Commission.

I cannot go any farther than this. During the twenty-five years that have elapsed since the date of that decision, all the members of the Commission have died, and the reasons grow stronger from day to day why the awards of the Land Commission should be treated as final.

One thing is clear, the land was awarded in the body of the award to Mahuka alone. The land was treated as his by the appraisers and by the Privy Council. He held it under a Royal Patent from 1849 to 1881, thirty-two years, as its undisputed owner. The fact that the evidence before the Commission shows that Kaai senior, his brother, had, if he chose to insist upon it, a right to have his name inserted in the award as a tenant in com-

mon with his brother Mahuka, is not sufficient to raise a trust in Mahuka for him. He may have, for all we know, relinquished his claim by an unrecorded deed now lost. It is to be presumed that he was aware of the award to Mahuka alone, and that he consented to it. His whole conduct, and that of his son and heir Simon, is in accord with this view. The occasional use of this lot as a residence by Simon is fully accounted for, in my opinion, by the relationship of nephew which he sustained to Mahuka, and which, among Hawaiians, would weigh for a great deal.

The heading of the award is to Mahuka and Kaai, but it is a mere heading, and the tenor of the award throughout contradicts it.

On a careful review of the case, I think the bill should be dismissed.

Honolulu, April 24, 1885.

LONO *et al.* *vs.* M. PHILLIPS *et al.*

EXCEPTIONS TO FINDINGS OF JUDD, C. J.

APRIL TERM, 1885.

JUDD, C. J.; MCCULLY and AUSTIN, JJ.

Neither a guardian nor his grantees will be allowed to set up possession or title in land adverse to the ward.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of ejectment to recover possession of a parcel of land at Niulii, Kohala, Hawaii, consisting of eleven acres and 96 8-10 fathoms. It was awarded to one Kupanapau by award of Land Commission No. 8898, and a Royal Patent was taken out thereon numbered 1338. The jury was waived and the Chief Justice, holding the January term, 1885, gave judgment for the plaintiffs, to which exception was taken.

It appears from the evidence that in June, 1879, the Supreme Court in probate appointed one Keawe guardian of the plaintiffs, the minor children of Kuhaiki and Kalai. Keawe testified at the hearing in probate that at the death of Kuhaiki his (Kuhaiki's) children inherited the lands of Kuhaiki, subject to the widow's dower; that the land at Kohala is rented to Kalai, a lawyer, at \$10 per acre, ten acres of which is rented. He undoubtedly referred to the land in question, for the proofs show that ten acres of it was rented to one Z. Kalai, a lawyer, now Police Justice of Kohala, at \$10 per acre per annum, who is one of the defendants refusing to attorn to the plaintiffs.

This Keawe, then, obtained possession of the land as guardian of these children, Lono and Kalaukoa, and on the 16th of January, 1883, he executed a mortgage of the same to C. J. Fishel, reciting that this "land had become vested in him by inheritance." He signed the mortgage as J. K. Kawainui, taking his father's name as his surname. The land was sold at auction under the power of sale contained in the mortgage and the defendants M. Phillips & Co. became the purchasers.

At the trial it was shown that the patentee Kupanapau died in 1848, or thereabouts, leaving no widow nor issue. He had brothers, Kalimahauna and Kapahi, and sisters, Kawahie and Kahookaliki. None of these left any issue except Kahookaliki, who had by her husband Kalaukoa a son Kuhaiki, now deceased, the father, by Kalai (w), of the minor plaintiffs. As grand-niece and nephew of the patentee Kupanapau they stand in an inheriting relation. But it is urged that Koko, wife of Kapahi, survived him and so her interest is outstanding, and the plaintiffs ought not to recover more than they have shown title to.

But the defendants, Phillips & Co., stand in the place of Keawe, who voluntarily surrendered to them the possession of the land. Keawe having entered upon this land as guardian of the plaintiffs, neither he nor his grantees will be allowed to set up possession or title in themselves adverse to the *cestuis que trust*, the wards of Keawe. See Perry on Trusts, Sec. 863.

The defendants are charged with notice of the public record appointing their grantor guardian of the plaintiff minors. Moreover the recorded lease from Kalimahauna to Kalai, and his sub-leases

as well, are notice to Phillips & Co. that there were parties in possession holding under a party other and adverse to Keawe, and should have put them upon inquiry. The possession of a good part of this land by plaintiffs' tenants was notice to the defendants to the same effect.

Phillips & Co. are in no sense *bona fide* purchasers for value. They took a title from one who not only had none, but who could not be permitted to show that he had one, at least until he had surrendered his guardianship and the possession of the estate to his wards and put himself thereafter in a hostile position to them.

We think the judgment below was correct.

Exceptions overruled.

Kinney and Peterson, for plaintiffs.

R. F. Bickerton and A. Rosa, for defendants, *M. Phillips & Co.*
Honolulu, May 26, 1885.

AKIONA vs. KOHALA SUGAR COMPANY.

EXCEPTIONS TO FINDINGS OF AUSTIN, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

A tenant, who has the right to remove fixtures, must do so before he quits possession.

Plaintiff having surrendered all claim to premises under a certain lease, and admitted that he was a tenant at will, cannot recover for a house built by him on the premises for which, under the lease, he was to be paid at the end of the term.

Decision of the Court below, holding that Defendant, a corporation, is estopped by acts of its manager and agent, reversed.

Austin, J., dissenting.

OPINION OF THE MAJORITY OF THE COURT, PER JUDD, C. J.

WE refer to the opinion of Mr. Justice Austin, below, for a statement of the essential facts of this case.

For reasons which will appear later we do not think it necessary to decide whether the defendant corporation was bound by the lease made by manager Johnson, or whether a ratification has been proved.

We think the rights of the parties in this case are to be determined by the instrument dated May 6, 1882, and called a "surrender." It was an agreement made in settlement of an action of ejectment brought by defendant against plaintiff for the possession of the premises in controversy. It recites that "whereas the said party of the second part has commenced a suit in ejectment against the said party of the first part to eject him from certain premises at said Kohala, the property of said party of the first part, which said premises are claimed by said party of the first part by virtue of a lease made to him by Henry Johnson, as manager of the Kohala Plantation, *the validity of which lease is denied by said party of the second part*; now, therefore, the said party of the first part, in consideration of the discontinuance and withdrawal of said suit, doth hereby surrender the said lease and *relinquish all claim to said premises or any part thereof by reason of the said lease or by reason of any right or claim arising thereout or therefrom*, and doth hereby admit all of the claim of the plaintiff, the Kohala Sugar Company, in and to the premises, and that he, said party of the first part, is tenant at will only of the same, and at any and all times, on ten days' notice to quit, shall and will quit and surrender possession thereof to the said party of the second part, and will on demand pay up all arrears of rent and thereafter make payment of rent from time to time as demanded."

It seems to us that the above instrument released the Kohala Sugar Company from its obligation to pay for the building erected by Akiona. That right arose, if at all, from the Johnson lease, for it was the only contract existing between them. The suit in ejectment was brought since the corporation maintained that it was not bound by the Johnson lease. If it was brought because the rent had not been paid, as Mr. Chapin says, it is unlikely they would have allowed Akiona to remain on the land as a tenant at will paying the same rent. We think the effect of the whole testimony is that the object of the suit was to test the liability of the corporation on the Johnson lease.

Now, Akiona, in consideration of the withdrawal of the suit, not only "surrenders the lease" but relinquishes all claim to the premises on which stood the house which he had built, and therefore the house itself, "by reason of the lease or by reason of any right or claim arising thereout or therefrom." The right he claimed, that the company should pay for this house, was a right arising from the lease, and he relinquished it to the company as effectually as he relinquished his claim to possession of the land for the three months remaining of the unexpired term. We gather this intent of Akiona from the whole instrument.

We think that the effect of this instrument was to create new relations between the parties and cancel all claims which Akiona might have had by reason of the Johnson lease. Otherwise, why should the corporation have discontinued its suit? The Johnson lease had nearly expired, and it could hardly be that the only consideration moving to the corporation was the recognition by Akiona that his tenancy for the next three months was at will, paying the same rent. We think it is a fair inference from the surrender that Akiona thought he could not hold the company bound by the Johnson lease or he would not have consented to relinquish his rights under it. It is unphilosophical to say in the face of the surrender of the lease signed by Akiona, which recites that the company disputed the validity of that lease, that it left in force and effect an important and valuable covenant moving to Akiona from the company.

We think that Akiona should be held to be where his written deed places him—a tenant at will of the company subject to ten days' notice.

But it is clear from the testimony that the company gave him the privilege of removing his building.

He had abundant time in which to do this. By all the authorities a tenant who has a right to remove his fixtures must do so before he quits possession.

Akiona cannot claim that he had not a reasonable time, for he stipulated that he would vacate the premises in ten days after notice to quit. We find no evidence that he attempted to move his

building. Failing to exercise this privilege before his interest in the land expired, he could not do so afterward, because the right to possess the land and the fixtures as a part of the realty vested immediately in the landlord.

Taylor's Landlord and Tenant, Sec. 551.

The judgment below should be reversed and judgment now entered for the defendant.

A. S. Hartwell, for plaintiff.

W. R. Castle, for defendant.

Honolulu, May 26, 1885.

DISSENTING OPINION OF AUSTIN, J.

In this case I refer to and adopt the opinion of the Court below, except in so far as the same may be added to or modified by what I now say. Henry Johnson was the acting manager in charge of the defendant, owning a large sugar plantation, consisting of a mill for the manufacture of sugar, and many hundreds of acres of land situated at Kohala, Island of Hawaii. The office of the corporation was at Honolulu, Island of Oahu. Books of account were kept at the plantation, but its leading officers, including its President, Treasurer and Secretary, resided at Honolulu, and the corporation books were there kept. Necessarily the practical business and working of the plantation was left in the hands of the manager. The multifarious and extensive duties thereby devolving upon such an officer are well known. Doubtless Henry Johnson, as such manager, was the general agent of the company. See Story on Agency, Sections 17, 53.

The premises in question, prior to the three years' lease thereof, executed by Johnson to the plaintiff, had been occupied as a leasehold at \$12 a month, the same rent as that agreed to be paid by said three years' lease. Yearly reports of rents received at the plantation, including rents from Akiona, but not naming him, were sent to the corporation officers. The land let was small; the interests involved in the lease were unimportant for such a company, and were not unusual. I think Johnson acted within the apparent scope of his authority, and that the lease was binding in favor of the plaintiff, who had no notice of any By-law requiring

the signature of the President and Secretary to written documents.

I refer to *Crowley vs. Genesee Mining Company*, 55 Cal., 273, where an important mining contract was executed by the President and Manager of a mining corporation whose company office was in San Francisco, far away. See also Story on Agency, Sec. 53. In that case the plaintiff recovered.

The right to recover all that the plaintiff asks here can also be sustained as of the nature of an estoppel *in pais*.

"If a man, supposing he has an absolute title to an estate, should build upon the land with the knowledge of the real owner, who should stand by and suffer the erection to proceed without giving any notice of his own claim, he would not be permitted to avail himself of such improvements without paying full compensation therefor."

I Story's Eq. Jur., Sec. 388.

The act of Johnson, who was in charge of the property of the corporation, in permitting Akiona to erect a house on the land, even though this might be in excess of his authority as manager of the plantation, was of such a character as would authorize the plaintiff, ignorant of the By-law, to believe that he had such authority; and the corporation would be estopped to say that it did not know that the house had been put up. The local directors also must have known it.

I do not here argue the question of ratification by acceptance of rent, though strong. It would seem that the local directors knew, or ought to have known, of its payment. But the act of Johnson was more than a silent acquiescence; it was a positive written permission to make the erection, and if invalid was a fraud by which the company was estopped. See Smith's Leading Cases cited in opinion below; Story's Eq. Jur., Sec. 387.

If these views are correct, on the 6th of May, 1882, the plaintiff was in possession of a valid leasehold which would expire on August 9, 1882, at \$12 a month rent. He was also the owner of an unquestionable claim against the defendant here in suit for \$1,000, the value of the new building he had erected on the land leased two years before.

An action of ejectment by defendant against plaintiff for the land leased was then pending at Hilo, and by a paper then exe-

cuted at Hilo between the parties the defendant claims that the plaintiff released the demand in suit. The paper is as follows :

"This indenture, made this 6th day of May, 1882, by and between Akiona (Ch.) of Kohala, Island of Hawaii, of the first part, and the Kohala Sugar Company, a corporation duly created and existing under and by virtue of the laws of the Hawaiian Islands, of the second part, witnesseth :

That whereas the said party of the second part has commenced a suit in ejectment against the said party of the first part to eject him from certain premises at said Kohala, the property of said party of the second part, which said premises are claimed by said party of the first part by virtue of a lease made to him by Henry Johnson, as manager of the Kohala Plantation, the validity of which lease is denied by said party of the second part; now, therefore,

The said party of the first part, in consideration of the discontinuance and withdrawal of said suit, doth hereby surrender the said lease and relinquish all claim to said premises, or any part thereof by reason of the said lease, or by reason of any right or claim arising thereout or therefrom; and doth hereby admit all of the claim of the plaintiff, the Kohala Sugar Company, in and to said premises, and that the said party of the first part is tenant at will only of the same, and at any and all times, on ten days' notice to quit, shall and will quit and surrender possession thereof to the said party of the second part, and will on demand pay up all arrears of rent and thereafter make payment of rent from time to time as demanded.

And the said party of the second part, in consideration of the aforesaid, doth hereby agree to discontinue and withdraw the said action of ejectment.

In witness whereof the said parties hereto have caused the due execution thereof by the attachment hereto of the corporate seal of said company, and the several hands and seals of said party of the first part, and names and seals of the President and Treasurer of said corporation." * * *

In *Rich vs. Lord*, 18 Pick., 322, heard in 1836, Shaw, C. J., says :

"It is now a general rule in construing releases, especially where

the same instrument is to be executed by various persons standing in various relations and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears by the recital, by the nature and circumstances of the several demands—to one or more of which it is proposed to apply the release—that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent every part of the instrument is to be considered.”

The release in this case was from plaintiff and others as general creditors severally of John Erskine Jr. and Madison D. Erskine, who assigned property to pay their debts. The plaintiff besides held notes secured by a mortgage on property assigned which were not specially secured by the assignment. The plaintiff takes an interest under the assignment and executes, with the other creditors, a release, saying that “they so severally release said John Erskine Jr. and Madison D. Erskine of and from all and singular their several debts and demands against them of every name and nature.”

The Court held the mortgage and notes not released.

In *Lyman vs. Clark*, 9 Mass., 234, decided in 1812, where the consideration of the release was \$25 and the additional sum sought to be released was £50, secured by will of Caleb Clark, the Court say :

“The words used in this release ought not to be extended beyond the consideration. Otherwise we should make a release for the parties, which they never intended or contemplated. The whole instrument is to be taken together, and not divided into parts. It is a general and reasonable rule that more general words in an instrument shall be restrained by other expressions more limited in the same instrument.” And at page 237 the Court quotes from Bacon’s Abridgment as follows :

“That where there are general words all alone in a deed of release they shall be taken most strongly against the releasor ; but where there is a particular recital in a deed and then general words follow, the general words shall be qualified by the particular recital.”

The language of the release was : “We do each hereby acquit

and discharge the said Eleazer Clark from all demands we have or may have on him by virtue of said Caleb's last will."

The Court held this no release of the £50.

In *McIntyre vs. Williamson*, 1 Edw. Ch., 347, decided in New York in 1831, where for a consideration of \$200 a demand for that amount and also a mortgage and bond for \$950 were claimed to be released, the law was laid down as above cited. The language of the release was ample to include the mortgage but did not specify it.

See also *Moore vs. McGrath*, Cowp. 9; *Keelikolani vs. Commissioners*, not reported; *Whallon vs. Kauffmann*, 19 Johns, 97; *Jackson vs. Stackhouse*, 1 Cowp., 122; *Coles vs. Hawes*, 2 Johns. Cas., 203 and note 2; 2 Blacks. Com., 379; *Dewey vs. Bordwell*, 9 Wend., 65.

The law of release being as above quoted, I think that the plaintiff's demand in this case was not released or intended to be released by the surrender of May 6th. The consideration first named was the discontinuance of the ejectment suit. Had that suit succeeded, as I have shown, the defendant could at most have recovered only the possession of the land, including the building, for the value of which this suit is brought. The demand for that value would have remained intact. The lease had but three months and three days to run. The plaintiff for his surrender of it received what might be considered by him nearly or quite as valuable—an indefinite extension of his possession, at the same rent at will, on ten days' notice to quit. He received nothing more. A verbal right to remove his erections was thereafter accorded to the plaintiff. It was of little worth to him. He had no land proper to move the building on to. If the defendant is right, the plaintiff intended to give up for the flimsy title of a tenant at will on ten days' probation and a chance to keep his leasehold for three months, which might be deemed an even bargain; but also a sure demand for \$1,000. That demand was not mentioned in the document, nor can I believe that it was contemplated or intended by the parties. The according, subsequently, to Akiona of the right of removal and his declining to take advantage of it, and his persistent asking for payment for the value of the building as well as of his supposed interest in the fee of the leased land,

show that the parties did not intend the surrender or release of the claim in suit. Their minds did not meet on that point. The object of the paper was the surrender of possession of the premises and the substitution therefor of the tenancy at will. And the words "relinquish all claims to said premises or any part thereof by reason of the said lease," followed by the general words "or by reason of any right or claim arising thereout or therefrom, and doth hereby admit all of the claim of the plaintiff, the Kohala Sugar Company, in and to said premises, and that the said party of the first part is only tenant at will of the same," cannot be construed to cut off, without compensation, the plaintiff's claim in this action, which by the terms of the new tenancy it was evident nobody contemplated to be enforced before the expiration of the tenancy at will.

For these reasons I dissent respectfully from the opinion of the majority of the Court.

OPINION OF AUSTIN, J., APPEALED FROM.

On the 9th day of August, 1879, what appears to be a lease in writing, from the defendant to the plaintiff, of certain land and premises in Kohala, Hawaii, for the term of three years from date, at the monthly rental of \$12, was executed and delivered to the plaintiff by H. Johnson, who signs the instrument in the name of defendant by himself. At the time he was acting manager of the plantation, in the absence of Mr. Geo. C. Williams, manager, and remained such acting manager till the return of Williams in 1880. There were, in the absence of Williams, two local directors, whose duty it was to confer with Johnson about plantation matters.

The instrument, in terms, gave plaintiff the right to erect a certain building on the land and move another, and agreed that at the end of the lease the defendant would buy the new house at a reasonable price. In pursuance of this lease, the plaintiff at once entered into possession, and moved one house and erected another, and occupied the premises and paid rent till the return of Mr. Williams, the manager, in February, 1880, and soon thereafter was informed by Mr. Williams that his lease was void;

but was allowed to remain, and paid rent as usual to Williams, till he resigned as manager in 1881, and thereafter continued to pay rent to Mr. Chapin, as manager. In May, 1882, ejectment was brought by defendant against plaintiff, and thereupon an instrument was executed between plaintiff and defendant, which recites that the plaintiff, in consideration of the discontinuance and withdrawal of said suit (in ejectment), "doth hereby surrender the said lease, and relinquish all claim to said premises, or any part thereof, by reason of said lease, or by reason of any right or claim arising thereout or therefrom," and the plaintiff further consents that he is a tenant at will of defendant, removable on ten days' notice, and agrees to pay rent on demand.

Thereafter, about May, 1884, the plaintiff was ejected by defendant from the premises, and thereafter demanded payment for said building erected by him, or the right to remove the same, which were refused, and the plaintiff brings suit.

The by-laws of the defendant provide as follows :

"Legal signature.

"The President and Treasurer shall sign all conveyances and contracts, which are required by the laws of this Kingdom to be put on record, and all such other documents (not of record) as require the company's signature.

"They shall sign all certificates of stock."

No notice of this by-law was brought home to the plaintiff, and he was not bound by it. See Potter on Corporations, Sec. 143. The President and Treasurer were resident at Honolulu, Oahu, and the books of the Company were there kept. The plantation was on Hawaii. The evidence shows that the practice of the Company was for the President and Treasurer to execute all written contracts, including leases, and that no actual authority was given to the manager or acting manager to execute leases like the one in suit. But the by-law does not prohibit it. Whether the lease was binding on the defendant depends on whether its execution was within the apparent scope of Johnson's authority. He was acting manager, in charge of a large plantation. No notice is shown to plaintiff of any local trustees appointed or acting. Johnson assumed to sign for the defendant. He was their general agent, and I shall hold that the execution

of this lease was within the apparent scope of his authority, and the lease was binding on defendant.

See Potter on Corporations, Sections 128, 129 and 144.

If I should be overruled in this conclusion, at all events, Johnson had authority sufficient to uphold his verbal lease to plaintiff for a year, and the defendant was bound at least for that term. See Taylor's Landlord and Tenant, Sec. 12.

Plaintiff had a right to assume that Johnson could let him into possession, and authorize him to build as he did. Plaintiff acted on that assumption, and entered and built the house, for the value of which he brings suit. Johnson assumed the right to make the lease as he did. If he had no such right, it operated as a fraud on the plaintiff. What Johnson did was at least license to Akiona to enter and build, and the defendant is estopped from denying it. The defendant's high officers cannot remain in Honolulu inactive, when valuable erections are made on their land, with the knowledge of their acting manager, and on his authority, and afterwards deny his authority, and appropriate the erections and refuse to pay for them.

See Smith's Leading Cases, Vol. 3, pp. 566 and 570, and cases cited.

Upon the foregoing grounds, I hold that when the instrument, dated May 6, 1882, was made, the plaintiff, when he should remove from the premises leased, was entitled to pay for the house he had built thereon. This was a valuable right. The paper did not say that he released it. It was couched in general terms, and the plaintiff cannot be supposed to have intended to release it. If it was so intended, it should have been expressed, under well-settled rules of law.

The right to compensation for the building was the plaintiff's when he was ejected from the land. The right of removal, if the plaintiff had it, was a separate one. His right to recover here was not lost by his non-removal of the building before he was ejected. He can recover its value upon the facts stated and proved. Upon those facts it appears that the building cost one thousand dollars.

The plaintiff may have judgment for one thousand dollars against defendants, with costs.

Honolulu, February 24, 1885.

MOKUHIA vs. WM. McCANDLESS.

QUESTION RESERVED.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY AND AUSTIN, JJ.

Defendant gave his infant child to plaintiff to bring up; no articles of adoption were signed; defendant subsequently took the child back; held, plaintiff was in *loco parentis*, and cannot recover for services rendered and necessities supplied to the infant, there being no contract by defendant to pay therefor.

OPINION OF THE COURT, BY JUDD, C. J.

THE question reserved at the trial of this case for the consideration and decision of the full Court is as follows:

“Where the defendant gave his infant child, less than two years old, to the plaintiff to ‘hanai,’ or bring up, there being nothing said by the parties as to the time during which this was to last, or whether it was to be without limit of time, no writing of adoption having been made, and the defendant thereafter took the child back; can the plaintiff recover of defendant for food and clothing supplied, and for services rendered to the infant while in plaintiff’s custody, there being no proof of any express agreement by defendant to pay therefor.”

The law of this Kingdom requires, in order to the validity of an adoption, that the contract be put in writing, and legalized before some Judge of a Court of Record. This was not done in this case; but it seems to us that in all other respects the child was situated in the plaintiff’s family precisely as if adopted. This condition of things lasted so long as the child remained there. The plaintiff was in *loco parentis*. He had the comfort of the child’s presence as an object of love and care, and in return provided it with food and clothing, and cared for its wants. The one was the consideration of the other. This was the only contract made or implied between the parties. Certainly when the child was taken there was no intention to make any charge for

keeping it. How, then, can such an intention or contract be inferred or implied, because subsequently the child was taken away? It was a contract when they took the child, or it never became one.

If an agreement of adoption had been executed and legalized, then it is quite clear that no obligation would exist on the part of the natural parent to pay for the food and clothing provided, and for the services rendered; for by the very terms of the agreement this obligation would be cast on the adopting parent.

No express contract to pay, on the part of the father, is shown. But we are aware that the law will impute a promise to pay where some duty is deemed sufficient to justify it. The child was not put out to board with the plaintiff; in such case the father would be liable for necessities upon his implied promise. Here the plaintiff took the child to bring up as his own. *Quoad hoc* he assumed all the obligations of a parent to the child, and we think he cannot recover of the father for what he did in favor of the child while the relation existed. Clearly, if a regular adoption had been entered into, and then rescinded by mutual consent, the action would not lie.

We think plaintiff cannot recover.

Judgment for defendant, *non obstante veredicto*.

Kinney & Peterson, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, May 27, 1885.

THE KING *vs.* CHOCK HOON.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Defendant received money from A, in Honolulu, to be delivered to A's mother in China; on defendant's return from China, having failed to deliver the money as agreed, he refused to return it to A; held, he was guilty of embezzlement, either in China or Honolulu, wherever prosecuted.

The presiding Judge at the trial refused to instruct the jury "That the offense of embezzlement under Hawaiian law is not committed by a party, entrusted with money here to be delivered to another in the Empire of China, failing so to deliver same." Held, that such refusal was not error.

OPINION OF THE COURT BY McCULLY, J.

THE defendant, about four years ago, being about to visit China, received from one Ah Fook twenty dollars, to be by him delivered to Ah Fook's mother, resident in China. He did not pay the money to the mother, and returning to this country he has not refunded it to Ah Fook. It is not doubted that there is an embezzlement. The question is whether it was committed within the jurisdiction of this Court or in China.

The defendant excepted "to the refusal of the Court to instruct the jury that the offense of embezzlement under Hawaiian law is not committed by a party, entrusted with money here to be delivered to another in the Empire of China, failing so to deliver the same."

And it is submitted on behalf of the defendant that, on the evidence, the offense of embezzlement was not committed within this Kingdom. It could not have been committed before the defendant left for China. If the offense was committed at all, it was committed and consummated in China, and therefore could not have been again committed in this Kingdom; that the only embezzlement that could have been committed in this case would

be refusal or failure to pay over the money in China to the person thereto entitled. A failure to pay over or account for the money to Ah Fook, either here or elsewhere, would not constitute embezzlement.

The evidence of the case, as it was recorded in the Police Court, is considered as annexed to the bill of exceptions. It appears by this that the complainant, Ah Fook, having heard by letter of the non-delivery of the money to his mother, spoke to the defendant soon after his return to this country, and demanded the return of the money. "The defendant said he would pay me back by-and-bye, but on my meeting him again and making demand, he answered, 'You go and sue me.'"

Archbold's Criminal Practice, and Russell on Crimes, upon the subject of venue, depend upon the following cases. In Hobson's case the prisoner received some money, the property of his master, in Shropshire, which he should have delivered to him in Staffordshire, where he and his master resided. Being indicted in the former county, it was considered by a majority of the Judges that the indictment might be in Shropshire, where the prisoner received the money, as well as in Staffordshire, where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offense a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property.

2 Archb., p. 566.

In the other, Taylor's case, the prisoner, delivering a lot of herrings in the county of Surrey, received ten shillings, which he should have rendered to his master in the county of Middlesex. The indictment was in Middlesex. The Court say "that here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offense be complete, nor the prisoner be guilty

within the statute, until he refused to account to his master. Sustaining the indictment in Middlesex. *Ib.*

In *Regina vs. Murdock*, cited in 2 Russell, 471, money received in Derbyshire to be paid to his employer in Nottingham, was held to have been embezzled in Nottingham.

In all these instances the principle is, that the offense is committed within the jurisdiction where the party fails to account to the person to whom he was bound to deliver the property, and who was the owner of it.

In our case, the owner was Ah Fook, who sent the money as a gift to his mother. The property must be considered to have remained in Ah Fook until such delivery. If it had been delivered in China there would have been no embezzlement, and the conversion by the defendant and non-delivery is clearly an embezzlement in China. There cannot be two embezzlements. But, on the other hand, if the defendant had, upon the demand of Ah Fook, returned him the money, as he might say that he had forgotten, or could not find the person, or did not care to take the trouble to deliver the money in China, it would not be held to be an embezzlement in China. His failure to account for the money here to Ah Fook also makes it embezzlement, but in no sense a second embezzlement. It is an act of conversion or appropriation by the bailee or carrier within the jurisdiction of the Court.

2 Wheaton on Crim. Law, 1857.

If the case had been prosecuted in China, a plea of conviction or acquittal would be a bar to prosecution here, and *vice versa*.

The exceptions are overruled.

W. O. Smith, for prosecution.

A. S. Hartwell, for defendant.

Honolulu, May 29, 1885.

N. HOLI *et al.* vs. P. F. KOAKANU.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

APRIL TERM, 1885.

JUDD, C. J. ; McCULLY AND AUSTIN, JJ.

A lease need not be in duplicate; one copy, if properly executed, is enough.

A lease was signed by both parties and kept by the lessor; a copy made for the lessee was found defective and taken away to be corrected; held, there was a delivery of the lease.

The Court having charged the jury that one lease, properly executed, held by either party, could be enforced by either; held, it was not necessary to direct the jury that the lease must be delivered.

OPINION OF THE COURT, BY AUSTIN, J.

THIS action was brought to recover damages for breach of the covenant for quiet enjoyment in a lease, and is here on exceptions.

The sole questions in the case are whether there was a sufficient delivery of the lease proved, and whether that question was properly submitted to the jury.

A lease was executed of taro land at \$420 a year rent. This was to include taro then growing. The defendant, the lessor, signed it, and the five plaintiffs, the lessees, signed it. Its terms were dictated by the defendant. An additional copy of the lease was made, but was found defective, and was taken away to be corrected. The lease was dated July 1, 1884, when the term was to begin, but was actually executed June 12th. The rent was payable in advance, and \$110 of it was paid down. It was said that the copy should be taken away and amended and brought back and signed, and both papers acknowledged July 1st, and balance of rent paid. On this point defendant says: "They told me they would take their paper to correct, and then come again, and then we would sign it, and it should become our lease. I said, if it corresponds with mine." The lease then signed, which the defendant calls his, was left with him, and he then received

\$110 on the rent, as stated by plaintiffs' witnesses. Defendant said if plaintiffs did not then pay part of the money, he would lease the land to other people.

These facts, and all the testimony in the case, were submitted to the jury, and they found there was a delivery on June 12th. The proof of delivery was ample. Had the finding been the other way, on such proof, the verdict would have been set aside. No substantial act remained to be done. The contract was complete, and the defendant held the covenant of the plaintiffs to pay, and had made his covenant to lease just as he intended to have them. The covenants were substantial and important on both sides. A copy or duplicate for the plaintiffs was contemplated, but it was not requisite. The lease was complete. It was immaterial which party held the custody of the paper. Either might hold it, and the other would be entitled to enforce it against him. Subsequent acknowledgment, though mentioned, was not essential to the validity of the lease. The finding of the jury cannot be disturbed.

See *McLean vs. Button*, 19 Barb., 450.

The other question arises on the charge. The presiding Judge charged the jury: "I do not think it necessary in a lease to have two parts; that is, a lease and a copy, one part to be kept by each party. If one is completed and properly executed, and either party holds it, it is a good lease, and can be enforced by either.

This is good law, and if the jury found the facts to be true, they constituted a delivery. But the defendant's counsel insisted that the Court should direct the jury, *in hæc verba*, that the lease must be delivered. This was not essential. The charge made was far more useful to the jury in reaching a verdict than the general language required.

The law, as here stated, is well supported by authority.

See *Souverlage vs. Arden*, 1 Johns. Ch., 239; 4 Kent's Com., 456; *Wallace vs. Berdell*, 97 N. Y., 13.

The judgment must be affirmed.

Kinney & Peterson, for plaintiffs.

W. R. Cattle, for defendant.

Honolulu, May 28, 1885.

MARY S. ROSE vs. HENRY SMITH.

EXCEPTIONS TO FINDINGS OF AUSTIN, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Plaintiff in ejectment need not show possession within twenty years if he shows title and no adverse possession is proved.

The Clerk having failed to enter judgment on a verdict, the Court will order it entered when the defect is noticed, *nunc pro tunc*.

It having been held, in *Keahi vs. Bishop*, 3 Haw., 546, that an adjudication of pedigree is binding in every subsequent action where the same question is raised; held that defendant here is estopped by the judgment in a former suit, notwithstanding the failure of the Clerk to enter judgment therein.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THE plaintiff brings her action of ejectment to recover possession of, firstly, a parcel of land situated on Fort street (Kaliu), Honolulu, being land conveyed by Kamehameha IV. to one Keoni Liaikulani, by deed dated August 12, 1862, and by Keoni Liaikulani conveyed to plaintiff by deed dated the 9th of October, 1872.

The Court below, Mr. Justice Austin, jury being waived, held that plaintiff could not take judgment for this parcel, as no original title in Kamehameha IV. was shown. To this no exception was taken by plaintiff and we are not to consider it further.

The complaint also claims, secondly, a parcel of land also situate at Kaliu, Honolulu, being part of the land described in Royal Patent No. 4517 (Land Commission Award 651) dated May 29, 1862, to Liaikulani. The plaintiff claims this parcel under the deed above mentioned, of Keoni Liaikulani to her, dated October 9, 1872, and recorded in liber 35, pp. 406 and 407.

The Court below gave judgment to plaintiff for this parcel.

The bill of exceptions raises, first, the question whether, no entry or possession of this land by the plaintiff or her predecessor or

ancestor being shown, the plaintiff has a right of action under the statute of limitation of real actions enacted in 1870.

We do not think that the statute bears the construction put upon it by the counsel for defendant, that in order to entitle a person to recover in ejectment he must show, in addition to his title in fee simple, that he has been in actual possession of the land within twenty years.

"It is a familiar rule of law that there can be but one actual seizin of an estate; that possession follows the title in the absence of any possession adverse to it; and, as a result of these two principles, that the rightful owner of land is deemed to have the possession until he is ousted from it or disseized, and also, in the absence of limitations, that he is restored to possession when the hostile possession or disseizin ceases. Want of possession, therefore, in the true owner implies ouster of him by another through an entry and hostile possession.

"Hence, the ultimate test of the want of possession of the true owner, and his neglect to assert his right to the possession, upon which the statutes of limitation rest, is the existence of an adverse possession of another denying the owner's right."

Sedgwick and Wait, *Trial of Title to Land*, Sec. 728.

"The true owner being in possession by force of his title, he so remains until disseized or ousted by some one who enters with a claim of adverse possession. When this ouster takes place the limitation of the statute begins to run. Bearing in mind at the outset that the object of the statute is to cut off and defeat the claim of the true owner, we arrive at the general principle that the criterion of the time when the statute begins to run is the ouster of the true owner and his consequent right to be reinstated in the possession, and that it is not in theory the entry of the adverse claimant. To determine, then, the character and sufficiency of an entry as the foundation of an adverse possession we inquire whether it is sufficient to constitute an ouster of the one entitled to the possession." *Id.*, Sec. 730.

We quote thus largely from the above work as expressing our ideas fully.

It is to be noticed that our statute is very similar to those of the New England States, following very closely that of Massachusetts,

and in none of them is there any provision as to what shall be deemed an adverse possession sufficient to bar a suit or entry.

"The statute will not commence to run until a cause of action has arisen in favor of the person having the rightful title; in other words, until he has been disseized by the person in possession or those in privity with him in the possession."

Wood's Lim. Actions, Sec. 256.

We do not think it incumbent upon the plaintiff to show that she or her ancestors have been in possession of the land within twenty years if she shows title to the same and no adverse possession is proved. It is therefore unnecessary to discuss the question whether certain accounts in the Probate Court are evidence of admission by defendant's ancestor of possession or receipt of rents and profits in behalf of Keoni Liaikulani. The difficulty with the proof submitted appears to be that it does not appear from what specific land the rents were collected.

But it is further contended that the records of the Court adduced by plaintiff are not conclusive either in her favor or against the defendant.

In 1853 letters of administration were granted to Kaaiawa (k) and Mahiai (w) on the estate of Liaikulani. Mahiai was Liaikulani's sister, and she by Kaaiawa had a son, Kaawihi (erroneously printed Kauhi), who is defendant's grantor.

In 1871 Kaaiawa, surviving administrator of the estate of Liaikulani and guardian of Keoni Liaikulani, was summoned on the petition of said Keoni, then twenty-three years old, to file his accounts. He did so, and the same were allowed by the Probate Court. Kaaiawa then petitioned for his discharge and that the property might be distributed to the heirs. Publication was made of the time of hearing, and proofs taken. The Probate Judge decreed that Keoni Liaikulani was the son and heir-at-law of Liaikulani. Kaawihi contested the claim of Liaikulani and appealed to a jury, claiming that Keoni Liaikulani was illegitimate, and that he, as nephew of Liaikulani, was the heir-at-law. The jury found, by their verdict, in favor of Kaawihi, and judgment was entered thereon. But the Court granted a new trial. The case is reported in 3 Haw., p. 356.

Upon a second trial on the same issue the verdict of the jury

was in favor of Keoni Liaikulani, but no judgment was entered upon that verdict. Exceptions were taken but were afterward withdrawn by the counsel for Kaawihi. It is claimed by defendant's counsel there is no judgment in favor of Keoni Liaikulani and that Kaawihi is not estopped by the verdict.

We think that as the law makes it the clerk's duty to enter up judgment on a verdict (unless certain named proceedings are taken) the Court must now regard such entry as having been made, and may order it to be made *nunc pro tunc*.

See *Tenorio vs. Brown*, 4 Haw., 665.

We are aware that it was the practice of former clerks not to enter judgments forthwith, but to take time for them, often after the Court had adjourned for the term, and generally when exceptions were taken the judgment was not entered until the case was finally disposed of. Exceptions having been taken to this second verdict, entry of judgment was postponed and probably forgotten by the clerk.

The principle that "the adjudication of a question of pedigree will be binding, not only in the proceedings in which they take place, but in every other in which the same question is agitated," was settled in *Keahi vs. Bishop*, 3 Haw., 546, and has since been repeatedly affirmed.

It would not be seriously contended that if judgment had been entered on the second verdict of the jury, Kaawihi and his grantee, the defendant, would not thereby be estopped.

The plaintiff, as the grantee of Keoni Liaikulani, must not be allowed to suffer by the act of the Court, and should be in no worse position by the failure to enter the judgment than if the judgment had been duly entered.

We think the estoppel is complete and accordingly overrule the exceptions.

E. Preston, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, June 8, 1885.

KAAWIHI vs. NOA.

EXCEPTIONS TO FINDINGS OF AUSTIN, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

Defendant held estopped by judgment; on authority of *Rose vs. Smith*, ante, 377.

OPINION OF THE COURT, BY JUDD, C. J.

THE plaintiff seeks, by his action of ejectment, to recover possession of a parcel of land situated in Puuhale, Kalihi-kai, Oahu, being the land granted to one Kaililaukea by Royal Patent No. 5,033.

The case was tried by Mr. Justice Austin, jury being waived, who rendered judgment in favor of plaintiff for one undivided half of the land. Plaintiff excepts to this judgment.

The essential facts of the case are as follows: Kaililaukea, the patentee, died intestate in 1853, leaving a daughter, Mahiai, by his wife, Hakookoo, who died before he did. Kaawihi, plaintiff, is the son and heir-at-law of Mahiai. This married couple, Kaililaukea and Hakookoo, had four children, Liaikulani (k) senior, Miha (w), Kaawihi first (k) and Mahiai (w). All these, except Mahiai, had died before Kaililaukea. At the death of Kaililaukea there also survived Keoni Liaikulani, who is claimed by defendant to be a son of Liaikulani senior. The defendant Noa is in possession of the land as lessee of Mary Sylva Rose, who claims the land by deed of said Keoni Liaikulani, dated October 9, 1872.

The plaintiff offered evidence to prove that Keoni Liaikulani was not the legitimate son of Liaikulani. This was objected to, on the ground that plaintiff is estopped by certain records in the Supreme Court. These were produced in the case of *Rose vs. Smith*, ante, and are to be considered as evidence in the case before us. The decision in *Rose vs. Smith* is decisive of this case.

The plaintiff cannot now say that Keoni Liaikulani was not the son of Liaikulani. Keoni, then, as the son of Liaikulani, was the grandson of Kaililaukea, and entitled to inherit from him equally with the plaintiff (who is also a grandson of Kaililaukea). The judgment below was right, and the exceptions are overruled.

A. S. Hartwell, for plaintiff.

E. Preston, for defendant.

Honolulu, June 8, 1885.

KAAWIHI vs. MARY S. ROSE.

EXCEPTIONS TO FINDINGS OF AUSTIN, J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

This case is settled by *Rose vs. Smith*, ante, 377.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of ejectment to recover possession of a parcel of land in Kamanuwai (near Kaumakapili), in Honolulu, granted to Liaikulani by Royal Patent No. 1,971.

The plaintiff claims to be nephew and sole heir-at-law of the deceased patentee, being the son of Mahiai, patentee's sister.

The defendant claims, as grantee of Keoni Liaikulani, by deed dated 9th of October, 1872. Keoni Liaikulani is claimed to be a son of the patentee.

The case comes to us on exceptions by the plaintiff from Mr. Justice Austin, who tried the case, jury being waived, and gave judgment for the defendant.

It was stipulated that the evidence in *Mary S. Rose vs. Henry Smith* should be used in this case. Kaawihī, the plaintiff here, is the Kaawihī, grantee of Henry Smith, in the former case.

We think that the case before us is settled by that of *Rose vs.*

Smith, and that the plaintiff is estopped. The case at bar has this feature differing from the others, in that it is here clearly established that Liaikulani senior had actual possession of this land and lived upon it.

The exceptions are overruled.

A. S. Hartwell, for plaintiff.

E. Preston, for defendant.

Honolulu, June 8, 1885.

W. M. GIBSON *et al.* COMMISSIONERS OF CROWN
LANDS vs. J. H. SOPER *et al.*

APPEAL FROM DECISION OF McCULLY, J.

APRIL TERM, 1885.

McCULLY and AUSTIN, JJ.; JUDD, C. J., absent.

Public officers, who make contracts in behalf of the public, are not personally liable.

Commissioners of Crown Lands are public officers.

A judgment against the Commissioners, for damages for breach of covenants in a lease made by them, cannot be enforced against their personal estate, but must be realized out of funds in their hands as Commissioners.

Decree affirmed.

OPINION OF THE COURT, BY AUSTIN, J.

THIS cause is an appeal in equity from the decision of Judge McCully. The object of the plaintiffs is to enjoin the collection of a judgment in favor of Bishop & Co. against the plaintiffs, Crown Land Commissioners, upon an execution which the defendant threatens to levy upon the individual property of one of the plaintiffs, C. H. Judd.

The defendants claim that the plaintiffs are individually liable, and the plaintiffs deny it.

The judgment sought to be restrained was for the breach of a

covenant for quiet enjoyment, contained in a lease between the Commissioners of Crown Lands of the first part, and H. E. Whitney and J. W. Robertson, of the firm of Whitney & Robertson, of the second part. The lease recites that "they, the said party of the first part, by virtue of the authority in them vested by the Act to relieve the Royal domain from encumbrances, and to render the same unalienable, approved January 3, 1865, have and do lease certain lands in Honolulu to the party of the second part, for the term of ten years from January 1, 1881, at the yearly rental of \$800, payable quarterly, and all taxes; which rent the parties of the second part covenant that they will pay to the parties of the first part and their successors in office; and the parties of the first part further, for themselves and their successors in office, covenant for the quiet enjoyment of the land leased by the party of the second part, and in case of breach of any of the conditions of said lease by the party of the second part, they covenant that the party of the first part and their successors in office may re-enter." In the body of the lease the names of the Commissioners are not mentioned, and do not appear. The lease is signed by C. H. Judd, Commissioner and Land Agent; by Whitney & Robertson, by H. E. Whitney, and by H. A. P. Carter and J. S. Walker, Commissioners of Crown Lands.

The Act above referred to creates the office of the "Commissioners of Crown Lands." Sec. 2 declares that the lands by the Act of June 7, 1848, declared to be the private lands of His Majesty Kamehameha III, and which have descended to Kamehameha V, "shall be henceforth unalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever," and that the said lands thereafter cannot be leased for over thirty years. Sec. 4 provides that the "Commissioners of Crown Lands shall have full power and authority to make good and valid leases of the said lands for any number of years not exceeding thirty; but in no case shall it be lawful to collect the rents on the same for more than one year in advance, or to receive anything in the nature of a bonus for signing the said lease, and all the rents, profits and emoluments derived from the said lands, after deducting the necessary and proper expenses of managing the same, shall be for the use and benefit of the reigning Sovereign, and

payable by the said Commissioners to the order of the King, except when a minor," and then invested as the Legislature shall direct for his benefit; and except as provided by Sec. 5, which is now obsolete. Sec. 6 provides for the appointment by the King of the Board of Commissioners of Crown Lands, to consist of three persons, two of whom shall be from the King's Cabinet, and serve without any remuneration, and the other shall act as land agent, and shall be paid out of the revenues of the said lands such sum as may be agreed by His Majesty the King.

The action is brought by Bishop & Co. against C. H. Judd, W. M. Gibson and J. M. Kapena, Commissioners of Crown Lands, and counts on the lease above quoted from, and avers that the defendants are successors in office of the lessors therein named, and that said lessors covenanted by their successors in office, whereby these defendants are bound, for a breach of covenant, all forfeiture for a breach thereof having been waived by these defendants. After trial and verdict for plaintiff on December 1, 1884; judgment was entered that plaintiffs recover of said defendants \$8,000 and costs. See *ante*, p. 242.

From the law and facts as above detailed, there can be no doubt that the defendants are officers appointed by His Majesty to perform their duties as Crown Land Commissioners, which are specifically provided for by law, and they are, and become thereby, public officers. "One standing and acting in a public capacity, who makes a contract in behalf of the public, is not personally liable." *Simons vs. Harding*, 23 Pick., 120; *Mcbeath vs. Haldimand*, 1 T. R., 172; *Freeman vs. Otis*, 9 Mass. 272; *Fulham vs. West Brookfield*, 9 Allen, 1.

The fact that the funds are devoted specially to the use of His Majesty makes the Commissioners no less public officers. They become and are the agents of the Government to manage the property for the maintaining of the Royal state and dignity, and the Legislature assumes and the King consents to take away the right of alienation of the land forever.

In the cases cited, however, it is well settled that if the public agent, by his interference, prevents the remedy against the Government, he makes himself answerable, as if he engaged to pay expressly in his own name.

If we try the case at bar by this rule, we find no personal agreement or any misconduct on the part of these plaintiffs which renders them personally liable. They contract under the name which the appointment under the law gives them, that of "Commissioners of Crown Lands," and refer to that law for their authority, and contract for themselves and their successors, and execute only the leases for the time and on the terms which the law authorizes, and directs and requires them to do. The covenant on which they are sued is a usual and proper covenant, and does not bind them personally but officially; and their individual property cannot be taken on the execution issued herein.

Had the plaintiffs given a personal lease it would have been void under the law, and the lessees would have obtained no right under it save to sue at once the defendants personally for damages for a breach of contract. The evidence is plain that the lessees never intended to rely on the personal security of the plaintiffs or their predecessors.

In *Mucbeath vs. Haldimand*, 1 T. R., 181, above cited, the Court say that "the fund out of which the plaintiff was to be paid was the Treasury." In ordinary cases of the proper action of public officers in contracts, the fund from which payment is to be sought is the Government Treasury. It is not so in this case. Here, by the appropriation of the Legislature, a large property is set apart to be leased for the benefit of His Majesty, and the fund arising therefrom, after deducting the necessary and proper expenses of managing the same, shall be paid over to the order of the King. The act requires that the leases shall be made and the fund shall be so devoted. The covenants in those leases are their necessary accompaniments, and the damages for their breach are a lien upon the funds arising from their execution in the hands of the Commissioners. The Legislature so intended, and Kamehameha V consented to it, and his present Majesty is bound by it.

Having the fund arising from the leases, His Majesty must bear the burthen which comes from the breach of their covenants. If it were understood that such covenants could not be enforced, the proceeds of the leasing of Crown Lands would be much diminished.

The payment of the damages in this case must be made out of those funds as they are now or from time to time come into the hands of the Crown Commissioners, the defendants. Such payment is part of the "necessary and proper expenses of managing" the said land, and must be paid out of the fund. If such funds should be or hereafter come into the hands of said defendants, to the extent of the money so secured, they would be liable as for money had and received.

See *Freeman vs. Otis*, 9 Mass., 272.

The liability of the fund in these cases is analogous to that of towns and school districts in Massachusetts and New York, of municipalities, of boards of supervisors, of the funds of estates in the hands of trustees and personal representatives, in the absence of misconduct or of personal agreement to pay. The liability of trustees and administrators on their personal agreements in matters of the estate or trust arises justly, because, having the estate or property in hand, it is their own fault if they agree to more than is warranted. Many such cases are cited by the defendants' counsel, but are not in point.

See *Cronan vs. Cotting*, 99 Mass., 334.

The judgment entered is against the fund, either by direct action against the town or city or county, or by judgment against the agent, to touch only the fund in the agent's hands.

See *Fulham vs. West Brookfield*, 9 Allen, 1; *Eaton vs. Bell*, 5 B. & Ald., 34; *Atkin vs. Sawyer*, 1 Pick., 351; *Todd vs. Birdsall*, Cowp., 260; *Rumford vs. Wood*, 13 Mass., 192; *Duntz vs. Duntz*, 44 Barb., 459; *Haight vs. Sahel*, 30 Barb., 218; *Conrad vs. Rhaca*, 16 N. Y., 158; *People vs. Van Vechton*, 16 Johns, 59; *Uthwatt vs. Elkins*, 13 M. & W., 770; *Furnivall vs. Coombes*, 5 M. & G., 736.

The last two cases are relied on specially by defendants' counsel, but are not in point, for the agents failed to bind those whom they assumed to represent.

See also *Richardson vs. Harding*, 2 Hawn, 433.

To prevent any question, though scarcely necessary, we think the judgment should be amended by adding thereto the words, "to be collected out of the funds now in the hands, or which may hereafter come into the hands, of the defendants as Commission-

ers of Crown Lands." As shown in the opinion below, this can be done upon motion in the Supreme Court.

The decree of the Court below is affirmed.

Attorney-General Neumann, for plaintiffs.

A. S. Hartwell, for defendants.

Honolulu, June 12, 1885.

D. W. LUHA and WM. HOLT *vs.* A. FERNANDEZ JR.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

After death of decedent, his widow put Luha on the land to plant and cultivate a crop of kalo on shares; the land was sold to pay debts of decedent.

Held that Luha was not estopped to claim his half of the kalo from the purchaser of the land, if the purchaser was not misled by representations of Luha to suppose he was buying the crop; and that the widow, if she did not consent to the sale of the land with the crop, is not estopped to claim her dower in the proceeds.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action to recover the value of a certain crop of kalo planted on a parcel of land at Kapalama, Honolulu, Oahu, belonging to the estate of W. Mahuia Austin, deceased. After his death his widow, now the wife of William Holt, plaintiff, put Luha (the other plaintiff) on it to plant and cultivate a crop of kalo on shares. The land was sold by the administrator, under license from the Court, to pay decedent's debts. The land was put up by the auctioneer with the crop of kalo and was bought by defendant. The widow did not release her dower.

The verdict of the jury was for plaintiff Luha \$200 damages and for Mr. Holt \$66 66.

The case comes to us on exceptions from a refusal to grant a new trial on the ground that the verdict is contrary to the evidence.

An estoppel was claimed against the plaintiffs. The Court charged the jury that Luha was not estopped to claim his half of the crop of kalo from the purchaser of the land if he understood from conversations with Luha the exact circumstances of the case. If Fernandez was misled by misrepresentations of Luha to suppose that he was buying the crop, then he was estopped. The law as laid down by the Court is not excepted to. There was evidence which went to the jury that Luha had told Fernandez all the facts in reference to his planting and cultivating the crop, and so he did not act in ignorance. So, in respect to the Holt claim for one-third of the other half of the crop, the Court held that if Mrs. Holt, prior to her marriage, had consented to the sale of the property with the crop, they would be estopped to claim it now. The testimony on this point was conflicting, but there was evidence upon which the jury were entitled to find as they did.

We therefore overrule the exceptions.

C. W. Ashford, for Luha.

Kinney & Peterson, for Holt,

A. Rosa, for defendant.

Honolulu, June 15, 1885.

W. H. CUMMINGS vs. T. J. McCROSSON.

APPEAL FROM DECISION OF McCULLY, J.

APRIL TERM, 1885.

JUDD, C. J. ; McCULLY and AUSTIN, JJ.

A bill to set aside a sale of shares of stock, alleged to have been made under fear and duress, dismissed ; the evidence in support of the bill being extremely improbable.

Decree affirmed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is a bill in equity to declare null and void an alleged sale

to plaintiff of 50 shares of stock in the Reciprocity Sugar Company and also plaintiff's promissory note for \$6,000, their purchase money.

The bill alleges that on the 13th of last January, the defendant, the engineer of the plantation, while alone in the office of the plantation with the plaintiff, the manager of the plantation, insisted that the plaintiff should buy 50 shares of the capital stock of the company, then held by defendant, for the sum of \$6,000. That plaintiff declined to purchase, whereupon defendant drew a revolver from his pocket and pointed it at plaintiff and threatened to shoot him unless he gave defendant his promissory note for \$6,000, and plaintiff then fearing and believing that defendant would carry his threat to shoot into execution, and while the revolver was so pointed at him the plaintiff did, under fear and duress, make out, sign and deliver to defendant a promissory note for \$6,000, payable in thirty days, and defendant delivered a paper writing to the effect that he had sold to plaintiff 50 shares of Reciprocity Sugar Company stock for the sum of \$6,000, but did not deliver the stock.

Upon a full examination of the testimony taken we are of the opinion that the averments of the bill are not sustained.

The story is extremely improbable that plaintiff, who admits that he himself wrote out this note and this bill of sale, was kept under the fear of his life at the point of a pistol, which was kept leveled at him during the whole interview by defendant, even when defendant signed the bill of sale.

The conduct of Mr. Sheldon, the plaintiff's corroborating witness, as detailed by himself, is so unlike the way ordinary men would act on hearing that a friend's life was being threatened as to make us discredit his testimony. The subsequent friendly manner toward each other of plaintiff and defendant for some days after this transaction is also strong proof that the story in the bill is a fabrication.

We think the Vice-Chancellor was right in dismissing the bill.
Decree sustained.

E. Preston, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, April 16, 1885.

T. J. MCCROSSON *vs.* W. H. CUMMINGS.

EXCEPTIONS TO RULINGS OF AUSTIN, J.

APRIL TERM, 1885.

JUDD, C. J. ; MCCULLY and AUSTIN, JJ.

In an action for malicious prosecution it is not necessary to show that the criminal charge before a magistrate, on which the action is based, resulted in an acquittal ; it is enough if the charge was discontinued by the prosecution, the rule being that the proceeding must have come to an end, whatever be the form of the termination.

OPINION OF THE COURT, BY JUDD, C. J.

THE case comes to us on exceptions by the defendant to certain refusals of the Court who tried the case to direct the jury as requested.

The action was Case for malicious prosecution, the complaint averring that on the 17th of January last, at Hana, Island of Maui, the defendant maliciously, etc., and without probable cause, caused the plaintiff to be imprisoned on a false charge that plaintiff had committed the offense of using threatening language to the defendant, and caused him to be arrested and brought before the District Justice, whereupon he was admitted to bail to appear on the 19th of January, pursuant to the condition of his bond, and the plaintiff appeared before said District Justice and the defendant did not appear to prosecute said charge, and thereupon the plaintiff, by order of said District Justice, was discharged on the said complaint.

The evidence is that the Deputy Sheriff stated to the Justice that he had no evidence in support of the charge, and asked to enter a discontinuance, which was allowed and the plaintiff was dismissed.

It is claimed on behalf of the defendant that the evidence does not sustain the allegation, and that the Court should have directed the jury to find for the defendant.

Is the variance material ? We think not. The statement by

the Deputy Sheriff, who had charge of prosecutions in the District Court, that he had no evidence in support of the charge and so asked to enter a discontinuance, might well be in consequence either of the failure of the defendant to appear and prosecute the charge, or his unwillingness, if present, to give testimony against the plaintiff. On this the District Justice allowed a discontinuance and dismissed the plaintiff. This does not differ in effect from the allegation that the "plaintiff was discharged on said complaint." The legal effect would be the same, whether the complaint was discontinued, a *nolle prosequi* entered, or the plaintiff discharged or dismissed. Without trial of the case the prosecution abandoned it and the prisoner was released.

But it is further urged that a discontinuance or *nolle pros.* is not a sufficient ending of the prior suit.

The Court, in *Stone vs. Hutchinson*, 4 Haw., 124, said that the rule requiring it to be shown that the previous action terminated in an acquittal was founded upon the reason that it cannot be made evident otherwise that the plaintiff would not have been convicted; and if he had been convicted it would be evident that the accusation was not false. In that case the prosecution was withdrawn on terms consented to by the plaintiff—to wit, the surrender of certain papers he then held, and although some of the language used by the Court would imply that it was their view that the case must be shown to have terminated by an absolute acquittal, they are *obiter dicta* and beyond the scope of the case then under consideration.

Cooley on Torts, p. 187, says: "Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was; but other cases hold the contrary. But the reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

In the case of *Cardinal vs. Smith*, 109 Mass., 158, the Court say: "But if it (the prosecution) is commenced by complaint to a magistrate who has jurisdiction only to bind over or discharge, his record, stating that the complainant withdrew his prosecution

and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal." Citing *Sayles vs. Briggs*, 4 Met., 321 and 326.

"So if the accused, after being arrested, is discharged by the Grand Jury's finding no indictment, that shows a legal end to the prosecution." See *Morgan vs. Hughes*, 2 T. R., 225; *Freeman vs. Arkell*, 2 B. & C., 494; *Mitchell vs. Williams*, 11 M. & W., 205; *Bacon vs. Waters*, 2 Allen, 400. "And if the prosecutor, after procuring the arrest, fails to enter any complaint, this with the attending circumstances is sufficient to be submitted to the jury as evidence of want of probable cause." Cases mainly not accessible to us are cited in support.

In *Cardinal vs. Smith* the Court held that the failure of a plaintiff to enter in Court the writ in a civil action, on which he has maliciously and without probable cause procured the arrest of the defendant, is such a final determination of the action as to enable the defendant thereupon to sue him for a malicious prosecution.

In *Brown vs. Randall*, 36 Conn., 56, the Court held that it is not necessary, to sustain an action for malicious prosecution, that the plaintiff should have been acquitted on the criminal proceedings. It is sufficient if the plaintiff was discharged without a trial, by a withdrawal or abandonment of the prosecution, not made at his request or arrangement with him, if the jury shall find on the whole evidence that there was want of probable cause.

See also *Stanton vs. Hart*, 27 Mich., 538. Here a discharge on *nolle prosequi*, after efforts to procure a trial, was held a sufficient termination of the suit. "The action for malicious prosecution lies whenever the proceeding has come to an end, whatever may be the form of its termination."

We think that the above citations are sufficient authority for our holding that the ruling below was correct.

And it makes no difference that the proceeding in this case was upon affidavit of the defendant (if such indeed was made) charging plaintiff with having used threatening language, and the magistrate had jurisdiction only either to discharge plaintiff or order him to give a bond to keep the peace.

In *Dennis vs. Ryan*, 65 N. Y., 385, the Court held that where

one makes a false and malicious charge against another, and by means thereof procures the indictment and arrest of the latter, it is no defense to an action for malicious prosecution that the false accusation did not allege facts constituting the crime charged in the indictment or any other criminal offense.

We think the exceptions should be overruled.

A. S. Hartwell, for plaintiff.

E. Preston, for defendant.

Honolulu, June 15, 1885.

MRS. A. SWAN *vs.* J. F. COLBURN.

APPEAL FROM COMMISSIONERS OF PRIVATE WAYS.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

An easement by user, so far as it depends on an award by grant, runs from date of the award, not from date of a Royal Patent on the award; if it is based on a Kuleana Award, proof of user may run from a time antecedent to the award.

There may be a gate across a private way, without assertion of the right to close the way.

OPINION OF THE COURT, BY McCULLY, J.

APPEAL from the Commissioners of Rights of Way and Water.

The plaintiff is the owner of a lot of land, held by Royal Patent, based on Land Commission award, in the district of Puukolo, Honolulu. It is an interior lot, not lying on any street. There is access to it now by a passage over defendant's land, between buildings, of about three feet wide. The plaintiff claims to be entitled, by prescriptive right, to a passage at this point of nine feet wide, which has been obstructed to this extent by a small building placed there by the defendant three or four years ago.

The plaintiff's patent, No. 1,623, is dated August 30, 1853, based on Land Commission Award No. 2,944 B, dated December

14, 1852. The defendant's patent is dated April 17, 1854, No. 1,645, based on Land Commission Award No. 670, dated April 10, 1849.

So far as the relation of dominant and servient estates or easements established by user depends on a paper title, they must be held to run from the date of award in the case of grants made by award, and not from the date of Royal Patents subsequently issued, based on the award. See the Act to provide for the dissolution of the Board of Commissioners to Quiet Land Titles, approved July 20, 1854, found on page 415 of the Civil Code, which, in Sec. 2, enacts that any award of the Land Commission, not appealed from within ninety days, * * * shall be a good and sufficient title to the person receiving such award, and shall furnish as good and sufficient a ground on which to maintain an action for trespass, ejectment or other real action, as if the claimant had received a Royal Patent for the same. See also *Bruns vs. Minister of Interior*, 3 Hawn., 783. The defendant's devisor died in 1869, the defendant and his co-devisee being then minors of the ages of ten and seven years respectively:

Assuming, for the present, that the kind of user which is sufficient to establish an easement of a right of way existed from the year 1852 to 1869, seventeen years, and thereafter during the minority of the devisees, and after they arrived at majority until three or four years ago, when this obstruction, a small building, was placed in the way, we are asked to consider, then, whether the progress of the user is suspended through the minority of the heir or devisee, whether the time before such suspension may be brought forward and added to the time running after it, and finally whether twenty years is required to complete a right by user in this Kingdom.

In *Rooke vs. Nicholson*, 1 Hawn., 288, the Court held that it would not be reasonable or necessary to require twenty years' continuous use to create a prescriptive right of way in this country, saying that to go back twenty years would indeed carry us into the region of chaos. This case was heard in 1856. To have gone back to the year 1836 would indeed have been going to a time prior to establishment of rights as regulated by modern law. And the Court held that proof of a user since 1846, the

date of the organization of the Government, ought to be regarded as a good foundation for a right by prescription. So much we quote in reply to the position taken by defendant's counsel, that the user could be counted to run only from the date of the patent, or, as we have already said, from the award. The plaintiff, Rooke, had only received a patent for his land in 1849, but the Court considered that his user from 1839, when he obtained a lease from the King and Premier, was to be reckoned in the time he was acquiring rights.

A grant of the land by the Government, by what is called a kuleana award, may well be considered, for the purpose of determining appurtenant rights, to be the confirmation of an equitable right previously existing in the grantee, and for this purpose, therefore, proof of user may run from a time antecedent to the granting of the award. This was so held in *Rooke vs. Nicholson*, as quoted above.

There is satisfactory evidence before us that there was a user of way, as claimed by the plaintiff, since the year 1846. Over twenty years would have elapsed prior to the death of Kalua Pakohana, and the right of way would be established by prescription.

In this view it will not be necessary to consider now the question whether the time of prescription was suspended during the minority of the devisees, or whether, in that case, the time of previous user should be added to the following period, or the whole time must be made after the minority of the heirs or devisees had passed, concerning all which questions we have found the authorities are conflicting.

The principal evidence relied on to rebut the proof of user, is that of a gate set up and maintained by Pakohana. But there may be a gate across a private way without an assertion of a right to close the way; and such appears to be the state of facts in this case. The gate was only closed at night, and this for the purpose of excluding wandering sailors and drunken persons from the interior close. There is no satisfactory evidence that Pakohana attempted to exclude the tenants of plaintiff's premises. There was a gate also in *Rooke vs. Nicholson*, but it was not considered

to be a claim to bar lawful egress to and egress from the premises entitled to the enjoyment of the way.

We confirm the judgment made by the Board of Commissioners for the plaintiff.

W. R. Castle, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, June 15, 1885.

M. S. GRINBAUM & CO. vs. HEEIA SUGAR PLANTATION
COMPANY *et al.*

APPEAL FROM THE CHANCELLOR.

APRIL TERM, 1885.

JUDD, C. J.; McCULLY and AUSTIN, JJ.

The foreclosure of a mortgage on a sugar plantation decreed; and the mortgage held, by its terms, to cover advances made for carrying on the plantation.

DECISION OF THE FULL COURT.

UPON a careful examination of this case we are of the opinion that the decision of the Chancellor, dated March 12, 1885, should be sustained, and we adopt the same so far as the Macfarlane mortgage is concerned, but passing no opinion here on the Kennedy mortgage. On the first point passed upon by the Chancellor, as to Macfarlane's lien upon the original lease of the land of Heeia, we would likewise sustain his judgment thereupon, but this point was abandoned by plaintiff at the hearing.

The decree made below is affirmed.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for Macfarlane & Co. and Alex. Kennedy.

Honolulu, May 23, 1885.

DECISION OF THE CHANCELLOR, APPEALED FROM.

(1) The bill sets forth that the plaintiffs, on the 16th August,

1883, took a mortgage from the Heeia Sugar Plantation Company, a corporation established under the laws of the State of California, upon all the property constituting the Heeia Sugar Plantation, to secure the repayment of \$60,000 in three years, with interest semi-annually; and that \$60,000 and more have been advanced by plaintiffs to carry on the plantation. (2) That the semi-annual interest (\$2,600), due on the 16th February, 1884, has not been paid. (3) That said mortgage purported to be subject to the three following mortgages: First, from J. McKeague and Alexander Kennedy to H. Hackfeld & Co., dated September 30, 1879, and now by successive assignments held by C. M. Cooke, defendant; second, from J. McKeague and Alexander Kennedy to H. Macfarlane & Co., defendants, dated July 1, 1881; third, a mortgage from J. McKeague to Alexander Kennedy, dated September 24, 1881. (4) That plaintiffs are informed and believe that the last mortgage mentioned was collusive and fraudulent, etc. (5) That at the date of the execution of the mortgage to H. Macfarlane & Co., McKeague and Kennedy were partners, and plaintiffs cannot ascertain if there has ever been a legal dissolution of said partnership; that Kennedy's last place of abode in this island was at Heeia, but Mr. S. M. Damon is his attorney in fact. (6) That said mortgage from McKeague and Kennedy to H. Macfarlane & Co., was only to secure the debt due to H. Macfarlane & Co., and for money advanced by them. (7) That the said mortgage was, among other property, upon the lease of the Ahupuaa of Heeia from C. R. Bishop and wife to John McKeague, and by a subsequent agreement dated October 1, 1866, extended for the period of 18 years additional to October 1, 1894. That after the date of the mortgage to H. Macfarlane & Co., and before the date of mortgage to plaintiffs, the lease aforesaid was cancelled with the knowledge and consent of H. Macfarlane & Co., by a written agreement dated February 1, 1883, and recorded; that a new lease of the Ahupuaa of Heeia was executed to the Heeia Plantation Company, dated January 29, 1883, for the term of 22 years commencing October 1, 1882, and that thereby H. Macfarlane & Co. lost the security of said leasehold of the land of Heeia.

1. The bill prays, for an account of what is due plaintiffs, principal and interest, on their mortgage.

2. That in default of payment the Heeia Sugar Plantation Company may be foreclosed of their equity of redemption in the mortgaged premises.

3. That all said mortgages may be marshalled in the order of their priority and an account taken of what is due on each.

4. That the mortgage to Kennedy may be decreed to be fraudulent and void.

5. That H. Macfarlane & Co. have no lien or security upon the said lease of the Ahupuaa of Heeia.

6. That the said mortgage of H. Macfarlane & Co. is a valid security only to the extent of moneys advanced by H. Macfarlane & Co. to said John McKeague and Alexander Kennedy.

7. And for process and general relief.

The bill is dated July 3, 1884. On the 28d July, John McKeague, by his guardian T. A. Lloyd, was made a party defendant to this action, on the ground that by a decree of this Court in a former case McKeague is entitled to a certain equity in the property involved in this controversy.

The defendant C. M. Cooke submits to such order of the Court as may be made.

The defendant Kennedy says that he dissolved his copartnership with McKeague at the time of his sale to him of his interest in the plantation for \$54,500, and that the mortgage in question was given him to secure part of the purchase money and was not intended as a fraud upon any one; that the Heeia Sugar Plantation Company purchased the premises from McKeague with full knowledge of respondent's mortgage, and assumed payment of same, and that plaintiffs had full knowledge of said mortgage before making any advances, and took their mortgage subject to respondent's mortgage, and plaintiffs have made payment of one note of \$5,000, secured by said mortgage, and as to other matters they are either denied or respondent has no knowledge of them.

George W. Macfarlane and Henry R. Macfarlane, of the firm of G. W. Macfarlane & Co., make answer and say they are wrongly impleaded as H. Macfarlane & Co.; that they are ignorant of the matters set forth in the 1st and 2d allegations of the bill; and

that the mortgage made by McKeague and Kennedy to H. Macfarlane was by him assigned to G. W. Macfarlane & Co., on the 1st day of August, A. D. 1881; that the moneys advanced by them, to secure which the mortgage was given, were made to carry on the plantation of McKeague and Kennedy, and that advances were so made until Kennedy sold to McKeague and thereafter H. Macfarlane continued to make advances to McKeague and acted as his agent until 1st August, 1881, when H. Macfarlane transferred the agency and assigned the mortgage to G. W. Macfarlane & Co., of which firm H. Macfarlane was and is a partner; and that G. W. Macfarlane & Co. continued to advance money under the mortgage to McKeague to carry on the plantation until the 30th June, 1882, on which day McKeague owed them \$44,686.81, of which \$40,000 is secured by the said mortgage and is now due and owing with interest; that on the 1st July, 1882, the plantation having passed into the possession of the Heeia Sugar Plantation Company, a new account was opened with it and respondents advanced money to the company to carry on the plantation until ————— 1883, when it amounted to \$45,868 45, over and above the amount of \$40,000 secured by the mortgage, and that this amount was paid to respondents by the said company on the transfer of the agency to the plaintiffs. They admit that their said mortgage includes the assignment of a lease by C. R. Bishop and wife to McKeague and that afterward they made a new lease to the Heeia Sugar Company, but they deny that the first lease to McKeague has ever been cancelled or that they ever consented to the cancellation thereof, and they say that the Heeia Sugar Company had no power or authority to cancel the lease, etc.

The first question raised is whether the mortgage dated July 1, 1881, to H. Macfarlane & Co., covers and is secured upon the lease of the Ahupuaa of Heeia. On the 1st October, 1869, the owners of this land, Mrs. C. R. Bishop and her husband, had by an instrument in writing and recorded in book 29, folios 295 and 296, extended to John McKeague the lease of Heeia for a term of thirteen years from the 1st October, 1881. This lease would not by its terms expire until October 1, 1894. Macfarlane's mortgage recites this lease in the schedule of property mortgaged. But after the Heeia Sugar Plantation Company of California had pur-

chased the plantation from McKeague a new lease was obtained by it for twenty-two years from the 1st October, 1882, at an increased rental. This lease is dated the 29th January, 1883.

It was admitted by counsel for respondents that this new lease is not within the Macfarlane mortgage. But it is contended that as Macfarlane paid the increased rent under the new lease, and as the cancellation of the lease covered by his mortgage is on record, he was bound by the notice thus acquired and it amounts to a consent and ratification of the whole transaction. The evidence shows that Macfarlane did not know of the cancellation of the old lease or the making of the new lease at the time they were executed, but heard of them afterward. I think that Macfarlane's payment of rent on the new lease is not to be taken as a consent that he should lose his security on the old lease. He paid this rent as agent of the plantation and as one of its ordinary disbursements, not as mortgagee in possession. The title of the lessee was in him by way of mortgage and he did not sign the agreement of cancellation which would be necessary to divest him of title. In the decree of foreclosure the Macfarlane mortgage is to be held to cover the old lease of 1866 and its renewal of the 1st October, 1869, but not the new lease of January 29, 1883.

The next point, and one of more difficulty, is whether the advances made by H. Macfarlane & Co. to John McKeague after Kennedy sold out, or to the Heeia Sugar Plantation Company after their purchase from McKeague, as well as advances made by G. W. Macfarlane & Co., subsequent to the transfer of the agency to that firm, are covered by the mortgage to H. Macfarlane & Co.

H. Macfarlane testifies that the account and agency of the plantation was on August 1, 1881, transferred to G. W. Macfarlane & Co., of which firm he became a member July 1, 1881; also that, though the date of the assignment of the mortgage appears to be "1st day of August, 1881," it was in fact executed on the 21st day of July, 1883, and the date in the instrument was changed to "1st day of August, 1881." This also appears by an inspection of the instrument. It was recorded after this suit was begun.

No question is made as to the assignability of the Macfarlane mortgage. It runs in the habendum clause to the mortgagee H.

Macfarlane "doing business as H. Macfarlane & Co., their heirs, executors, administrators and assigns."

It was not assigned until the 21st day of July, 1883, several days after the execution of the mortgage to Messrs. Grinbaum & Co., the plaintiffs.

This view is further sustained by an instrument dated 20th August, 1883, between Henry Macfarlane & Co. and the Heeia Sugar Plantation Company, by which Macfarlane releases the company, as grantee of the mortgagor McKeague, from certain obligations in the mortgage as to consigning the sugars to him and waives the breaches of condition thereby; extends the time of payment of the mortgage to 20th August, 1884, and covenants that no demand shall be made until that day; that previous breaches of covenant and condition are waived; that the company agreed to pay the amount of the mortgage debt fixed at \$40,000 in one year from date. This instrument is signed and acknowledged by Henry Macfarlane of H. Macfarlane & Co., and indicates that at that late date H. Macfarlane, and not G. W. Macfarlane & Co., exercised ownership of this mortgage.

As regards advances made under it to McKeague after Kennedy sold out to the Heeia Sugar Plantation Company, I think that advances made to the original mortgagor and to his successors in the title are properly covered by the mortgage. The mortgagee might raise the question whether the mortgagor not so stipulating, he was compelled to advance money to carry on a plantation after it was sold to parties in whom he had no confidence. But the money having been advanced to the grantee by the mortgagor and expended in carrying on the plantation, I think equity would not allow a subsequent mortgagee, taking his mortgage from the grantee of the original mortgagor, to question this, and in the face of the agreement of the 20th August, 1883, made, as I understand it, at the instance of Grinbaum & Co., who then assumed the agency of the plantation and paid Macfarlane the excess of the debt over \$40,000, amounting to \$15,868 45.

The validity under the statute of frauds of the parol assignment of the mortgage is not properly in question in this case. But a case decided in this Court some years ago (*H. Hackfeld & Co. vs. J. K. Akina*, in 1873, not reported) holds that the parol assign-

ment of a mortgage of real estate, accompanied by endorsement of mortgage note and delivery of mortgage deed, is not invalid by our statute of frauds, which omits an important section of the original act of Charles II.

The question is not whether G. W. Macfarlane & Co. can foreclose the mortgage for money advanced by H. Macfarlane; the subsequent assignment, dated July 21, 1883, would make the right clear. The real question is whether the mortgage is security for such advances as another firm, of which H. Macfarlane is also a member, succeeding to the agency, should make, and whether it can be questioned by a subsequent mortgagee with notice. The law cited by counsel for plaintiffs with respect to sureties does not, in my opinion, apply.

The strict rule which releases a surety upon a deviation from the contract does not apply here.

The money paid out by G. W. Macfarlane & Co. was paid out in pursuance of the mortgage for future advances, so I think that plaintiffs cannot now question it.

In Jones on Mortgages, Vol. I., Sec. 373, the author says: "If the mortgage contains enough to show a contract between the parties, that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or incumbrancer upon inquiry, and if he fails to make it he is not entitled to protection as a *bona fide* purchaser." It cannot be said that Grinbaum & Co. did not know that G. W. Macfarlane & Co. had advanced the money. They paid this firm through the Heeia Company for the advances made over and above the sum secured by the mortgage, and as junior incumbrancers took their mortgage subject to the Macfarlane mortgage.

Jones, Sec. 376, says that "the agreement under which advances to a certain amount are to be made need not be in writing to be binding and effectual against subsequent liens." Sustained by New Jersey and Pennsylvania cases not accessible. But the agreement must be made contemporaneous, and no subsequent oral agreement can make a mortgage to secure future advances effectual in preference to a junior incumbrance. *Truscott vs. King*, 6 N. Y., 149, and *Hall vs. Crouse*, 13 Hun, 557. This last case

is authority that "parol evidence is admissible to show that the mortgage was given to secure future advances to be made by a party not named in the mortgage."

To apply these principles to the case at bar: The mortgage in question is certainly definite as to the amounts to be advanced and the time within which they are to be made, and the purpose is stated to be the furnishing and carrying on of the plantation, and it is unessential to a subsequent mortgagee whether the money be advanced by the original mortgagee or by a firm succeeding to the agency of which the original mortgagee is a member. Certainly neither the mortgagor nor his assigns could question it, and I fail to see how the subsequent mortgagee could have any greater equity. He took his mortgage with knowledge of the amount for which the prior mortgage was given, and it is no injury to him that the money was advanced by persons not parties to the original mortgage.

I know of no principle of law or equity upon which he can be allowed to take advantage of such a fact. He who seeks equity must do equity. In *Joslyn vs. Wyman*, 5 Allen, 92, it was held that "although a mortgage cannot, by oral agreement, be continued in force as security for a new indebtedness not embraced within the terms of its condition, yet if such an agreement has been made, and money has been advanced in consequence thereof by the mortgagee to the mortgagor, a court of equity will not aid the latter, or one who has taken a conveyance from him in a knowledge of the facts, in obtaining a release, or discharge the mortgage for the mortgagee." The Court say it would be contrary to equity to allow this, as it is in direct violation of his oral agreement. See also a similar case, *Stone vs. Lane*, 10 Allen, 74, and the Court here say that a court of equity will not assist any person to deprive the mortgagee of any security he would have against the mortgagor, unless the equitable right of such person is distinct from and superior to that of the mortgagor, citing 2 Story Eq. Jur., Sec. 1053, n. 3. See also *Crafts vs. Crafts*, 13 Gray, 360.

The case of *Taylor vs. Post*, 37 Hun, 449, is apparently opposed to this view. It decides that a mortgage to secure future advances is valid for that purpose only to the original firm which was mort-

gagee, and it could not by parol be made to cover or stand security for new indebtedness to a successor to the firm. But this was a bill of foreclosure by the mortgagee's administrator and does not affect the question whether a junior mortgagee can take this position.

I think that plaintiffs having full knowledge that a large proportion of the sums advanced under the H. Macfarlane & Co. mortgage was advanced by G. W. Macfarlane & Co., equity will not permit them to dispute the same.

As regards the Kennedy mortgage, it will be governed by the findings of fact and of law as made by me in the case of *McKeague vs. Kennedy*, *ante*, 347.

A decree of foreclosure in accordance with law and the principles here enunciated will be signed on presentation, and a reference is hereby ordered to a master to ascertain the amounts due on the several mortgages.

A. S. Hartwell and *W. R. Austin*, for plaintiffs.

F. M. Hatch, for defendants Kennedy and Macfarlane.

W. R. Castle, for Cooke.

Honolulu, March 12, 1885.

**M. S. GRINBAUM & CO. *vs.* HEEIA SUGAR PLANTATION
COMPANY *et al.***

APPEAL FROM THE CHANCELLOR.

JULY TERM, 1885.

JUDD, C. J. ; McCULLY AND PRESTON, JJ.

Where a mortgagor failed to designate to which of several debts payments by him to the mortgagee should be credited; held that the mortgagee was not bound to appropriate the payments to interest due on the mortgage, but could apply them to an unsecured debt for advances made to carry on the sugar plantation, the subject of the mortgage.

Decree of the Chancellor Affirmed.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an appeal by the defendant, the Heeia Sugar Company from a decision of the Chancellor made on the 17th instant, denying a motion made on behalf of the said defendant to rescind the decree of foreclosure and sale made herein.

On behalf of the defendant it was contended that as the complainant's had not kept a separate account of the moneys due on account of the mortgage, and of the account current for advances for carrying on the plantation, and as they had received payments in cash from the defendant, it was their duty to appropriate the moneys received in payment of the interest due on the mortgage, or at all events, considering their position as agents for the defendant, to have given notice of their intention not to apply it for that purpose.

Counsel for the defendant argued that the rule of the Civil law respecting appropriation should be adopted in this case.

The Court, however, sees no reason for departing from the course hitherto taken of adopting the rule of the Common Law.

The Court adopt the reasoning of the Chancellor as contained in his decision, and affirm the order made by him.

A. S. Hartwell for complainant.

P. Neumann and *F. M. Hatch* for defendant.

Honolulu, July 31, 1885.

DECISION OF THE CHANCELLOR, APPEALED FROM.

This is a bill to foreclose a mortgage, the breach assigned being failure to pay the semi-annual interest due February 16, 1884, of \$2,600.

The defendant corporation being, after decree entered, admitted to answer and defend, by consent of the plaintiffs, says in substance that it denies that the semi-annual interest, to wit, the sum of \$2,600 due the plaintiffs on February 16, 1884, was not paid, but avers the truth to be that between the date of the mortgage, August 16, 1883, and the 16th of February, 1884, when the interest became due, the plaintiffs had received from defendant \$10,606 55, being proceeds of sales of sugars and cash payments, one of which payments, to wit, of \$3,000, having been made on January 28, 1884, and that plaintiffs were bound to apply said pay-

ments first to the interest due upon the said mortgage, no portion of the principal being then due; and further that by the terms of the said mortgage, defendant is not bound to make any cash payments to plaintiffs until the expiration of three years from the date of the mortgage, said plaintiffs having agreed to accept payments from the crops to be raised upon said plantation.

By the mortgage, the defendant, as a mortgagor, covenants, (1) to pay the \$60,000 in three years from date, (2) with interest semi-annually, at nine per cent per annum; (3) to pay all taxes, charges and assessments on the said granted and assigned property, as well also on the said sum of money or indebtedness thereby secured; (4) to keep and observe the covenants and conditions in the leases; (5) to consign all the sugar manufactured, etc., during the next three successive crops to the mortgagees; (6) and that from the proceeds of each of said years crops and sugars, after deducting all commissions, charges, freights, expenses and all interest then due on the indebtedness aforesaid, the mortgagees may deduct and retain, to reduce the secured debt, \$30,000 from the crop of 1883-4, \$15,000 from the crop of 1884-5, \$15,000 from the crop of 1885-6, rendering the surplus to the mortgagor, etc.

The facts are that from the crop of 1883-4 there were no net proceeds, after deducting moneys laid out and advanced to carry on the plantation. The account current of M. S. Grinbaum & Co. shows a balance against the Heeia Sugar Plantation Co., January 1, 1884, of \$78,703 20, or \$18,703 20 over and above the mortgage debt; and on May 20, 1884, when the Receiver was appointed, of \$75,356 90, or \$15,356 90 over the mortgage debt. In addition to the receipts from sugars and realizations from the plantation, there was paid in San Francisco, by the defendant corporation, to plaintiffs, January 28, 1884, \$3,000, and on April 7, 1884, \$5,000, and on April 15, 1885, \$5,000.

The contention on behalf of the defendants is that the \$3,000 paid on January 28, 1884, should be appropriated by plaintiffs to the interest to fall due February 16th, \$2,600.

A careful reading of the mortgage shows that it does not in terms secure future advances. On the other hand it contains no agreement on the part of the mortgagees to make these advances.

It was undoubtedly the hope and expectation of both mortgagor and mortgagees that the proceeds from the plantation would be sufficient to pay all current expenses, and a surplus remain which was stipulated should be applied each year towards paying the \$60,000 secured by the mortgage.

Messrs. M. S. Grinbaum & Co., finding that the proceeds were not sufficient to carry on the plantation, write to the corporation in San Francisco, under date of March 15, 1884, stating that no funds being deposited with them to carry on the planting and other improvements which are absolutely necessary for the coming crop, on the plantation, advise them of a draft they had drawn on them for \$10,000, and desire the corporation to honor it with its acceptance. Mr. Grinbaum says he presented this draft personally, and it was not paid. Previous to this, Otto Muser, the President, and Hermann Liebes, a director of the company, had paid two sums of \$5,000 each, (in all \$10,000,) to him towards the running expenses of the plantation. This was in pursuance of a written contract, (copy of which is in evidence) dated October 13, 1883, by which Messrs. Grinbaum & Co. agree to advance (in addition to a sum of \$30,000) the further sum of \$10,000, for the current expenses of running the plantation during the months of November and December, 1883, in consideration of the promise of Otto Muser and Hermann Liebes to repay this sum by May 1, 1884.

I think this makes it clear that it was the understanding of the defendant corporation that Messrs. Grinbaum & Co. were not bound to carry the plantation for three years. But Grinbaum & Co. had advanced the necessary sums, up to that time, to carry on the plantation, and this with the knowledge and consent and presumably at the request of the defendant. The failure to pay the last draft of \$10,000 made it certain that the corporation would advance no more. I think that the covenant in the mortgage above stated, (number. 6) only bound M. S. Grinbaum & Co. not to take more than \$30,000 of the net proceeds of the crop of 1883-4, etc., towards paying the \$60,000 secured by the mortgage.

There were other and prior mortgages on the property, which I presume the corporation wished to pay with the excess over the \$30,000. But I cannot gather from the mortgage that Grinbaum

& Co. were obliged to apply the gross proceeds of the sugars to the payment of \$30,000 of the mortgage debt.

By the terms of the mortgage the interest due on the indebtedness was to be paid before the application of the \$30,000. This presupposes some proceeds available to be thus applied, but if the plantation went behind and cost more to run it than the returns, and the owner did not supply funds to run it, I fail to see how he could expect a mortgagee to apply any part of the gross receipts to payment of interest or principal. The \$3,000 paid in January by the defendant corporation was not directed by it to be applied to the interest to fall due in February, but, as I understand it, it was intended for running expenses of the plantation.

I think, on principle, that Messrs. M. S. Grinbaum & Co. were not bound to apply this sum to the payment of the interest. I think this is well supported by authority also.

The general rule is that a "mortgagee debtor may in the first instance appropriate a payment to whatever account he pleases, either principal or interest, or to another debt due the mortgagee. *Quicquid solvitur, solvitur secundum modum solventis.*" But when the debtor has omitted to make any specific application of the money he has paid, but has left this to the presumptions of the law, or to be applied by the creditor as he may see fit, he cannot afterward go back and make an appropriation of it himself. The general payment may be applied by the creditor to a claim against the debtor for which he has no security, or among secured claims to that for which he has the least security." Jones on Mortgages, Sec. 906 and cases cited.

Here we have no direction to apply the payment by the defendant to the interest, and an appropriation by the plaintiff toward the unsecured debt. See also *Doody vs. Pierce*, 9 Allen, 141; *Howe vs. Lewis*, 14 Pick., 331.

I see no reason on the defendant's answer and proofs to rescind the order of foreclosure already made in this case.

A. S. Hartwell, for plaintiffs.

Paul Neumann and F. M. Hatch, for defendant.

Honolulu, July 17, 1885.

M. S. GRINBAUM & CO. *vs.* HEEIA SUGAR PLANTATION
COMPANY *et al.*

IN RE CLAIM OF J. FOWLER & CO.

APPEAL FROM THE CHANCELLOR.

JULY TERM, 1885.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Fowler & Co. sold rails, cars, and appurtenances for a railway, to the Heeia Plantation, and the railway was operated by the plantation for over a year; a mortgage of the plantation, including railway, cars and appurtenances, to Grinbaum & Co. having been foreclosed, Fowler & Co. claimed the right to remove the track and cars, on the plea that the sale was conditional; held that the sale was absolute, and that the railway and its appurtenances was covered by the mortgage.

Decree of the Chancellor Reversed.

OPINION OF THE COURT, BY PRESTON J.

The bill in this case was filed on July 3, 1884, and sets forth :

That on the 16th of August, 1883, the Heeia Sugar Plantation Co., a corporation established under the laws of the State of California and doing business at Koolau, Island of Oahu, one of the defendants, executed and delivered to the plaintiffs a mortgage deed of all the property belonging to and forming said Heeia Sugar Plantation, and all other property that might thereafter be added to and constitute and form said plantation, to secure the repayment of \$60,000 in three years from the date thereof, with interest at nine per cent per annum, payable semi-annually, being for money advanced by said plaintiffs for the purpose of continuing and carrying on said plantation, and that \$60,000 and more had been advanced and were then owing to plaintiffs from said Heeia Sugar Plantation Co. under said mortgage :

That \$2,600 due to the plaintiffs for six months' interest on said mortgage on the 16th February, 1884, had not been paid :

That said mortgage was executed and purported to be subject to three mortgages, first from J. McKeague and Alexander Ken-

nedy to H. Hackfeld & Co., dated September 30, 1879, and by H. Hackfeld & Co. assigned to P. Isenberg, and by him assigned to the defendant, C. M. Cooke; second, a mortgage from said McKeague and Kennedy to the defendants H. Macfarlane & Co.; third, a mortgage from McKeague to said Kennedy:

That said mortgage from McKeague to Kennedy was collusive and fraudulent and void for want of consideration, intended and calculated to defraud subsequent creditors advancing moneys for carrying on said plantation, and ought not to stand as a valid security against the mortgage of the plaintiffs:

That at the date of the execution of said mortgage by said McKeague and Kennedy to H. Macfarlane & Co., said McKeague and Kennedy were partners and plaintiffs were ignorant whether said partnership had been dissolved, and avers in substance that Kennedy is absent and that one S. M. Damon was his attorney in fact:

That said mortgage from McKeague and Kennedy to H. Macfarlane & Co. was made to secure the debt due from McKeague and Kennedy to said Macfarlane & Co., and for moneys advanced to them, and the plaintiffs submit that said mortgage was a valid security only for the moneys advanced by said H. Macfarlane & Co. to said McKeague and Kennedy.

The bill contains further allegations respecting a lease comprised in the mortgage to H. Macfarlane & Co. not necessary to be repeated here, and prays for an account to be taken of amount due to plaintiffs and decree for payment: That on default, equity of redemption be foreclosed: That all said outstanding mortgages be marshalled and an account taken of what is due upon each: That the mortgage from McKeague to Kennedy be declared fraudulent and void against plaintiffs: That said mortgage to H. Macfarlane & Co. is a valid security only to the extent of the moneys advanced by said H. Macfarlane & Co. to said McKeague and Kennedy: And for general relief.

The bill was amended by making G. W. Macfarlane & Co. defendants, to whom the mortgage to H. Macfarlane & Co. had been transferred, and also J. McKeague.

A receiver had been appointed in other proceedings.

The defendants, G. W. Macfarlane & Co., Kennedy and Cooke

answered, and the bill was taken *pro confesso* as against the Heeia Sugar Plantation Co.

The case came on for hearing before the Chancellor, on 12th and 13th December, 1884, who on the 25th March, 1885, made his decree whereby he directed that the mortgage to the plaintiffs, and the several mortgages to H. Hackfeld & Co. and H. Macfarlane & Co., be foreclosed, and all the property described in the three several mortgages be sold at public auction, free from incumbrances, and the proceeds applied first in repayment of the amount found to be due upon an accounting before the master, upon the mortgage to H. Hackfeld & Co.; second, to the repayment of the amount found to be due on a like accounting, upon the mortgage to H. Macfarlane & Co.; third, to the repayment of the amount found to be due upon the mortgage to the plaintiffs; fourth, the balance, if any, to be paid into Court to await the Court's disposition of same: That said mortgage to H. Macfarlane & Co. be a security up to \$40,000 and interest, and that the mortgage to Kennedy and notes given therewith were void and of no effect.

The plaintiffs and defendant Kennedy appealed, and the decree was sustained by the Court sitting in banco at the last April Term. See *ante*, pages 397, 405.

The mortgage to plaintiffs comprised "all railways, railway locomotives, tracks, cars and trucks, now or hereafter belonging to or forming a part of said Heeia Sugar Plantation."

On the 23d April, 1885, a petition was filed on behalf of Robert Fowler, David Greig and Bernard Fowler, of Leeds, England, co-partners in business, under the firm name of John Fowler & Co., stating:

That they were the owners of certain rails, tracks, portable railroad, cars, rolling stock and other railroad appurtenances, then situated and being upon the Heeia Plantation according to a description thereof filed therewith:

That said railroad cars and appurtenances were then in the possession of the Receiver appointed by the Court in the said suit and then and now pending:

That said railroad was originally ordered by said McKeague when he was the manager and part owner of the said plantation;

that before the arrival of said railroad said McKeague sold said plantation to the Heeia Sugar Plantation Company ; that all of the property set forth in said schedule (except a certain amount of track not delivered) was delivered to said Heeia Sugar Plantation Company between the month of November, 1882, and October, 1883, upon the special agreement and contract that the title to said railroad should not pass to said Plantation Company until the same was paid for, but that the title to the same should remain in petitioners ; that in pursuance of said agreement said Plantation Company, on the 20th November, 1882, paid to petitioners \$6,000 and failed to pay any more on account of said railroad, and petitioners in consequence of said failure refused to deliver a certain portion of said railroad—to wit, about one-half a mile of portable track—and then held possession of the same ; that said plaintiffs (Grinbaum & Co.) well knew the above facts at the time of taking their mortgage and promised to pay for said railroad if the same were allowed to remain on said premises ; that neither said Grinbaum & Co., nor said Heeia Sugar Plantation Company have paid for said railroad, and the receiver appointed by the Court had refused to allow petitioners to remove the same. And petitioners prayed for an order allowing them to enter upon said Heeia Plantation and to remove so much of the railroad, etc., as had not been paid for.

Mr. Oscar Unna, the receiver, filed an answer and opposed the granting the prayer of the petition :

1st. Because the railway and other property claimed were fixtures affixed to the soil and thereby vested in and formed part of the security of said several mortgages :

2d. Because said several mortgagees other than said Grinbaum & Co. are not shown in the petition to have known or acquiesced in any of the alleged agreements mentioned, and therefore are not affected or bound thereby: and

3d. Because if said Grinbaum & Co. had no claim to said railroad property under the averments in said motion, they had the right to insist that said other mortgagees should exhaust their security against the same.

The petition came on for hearing before the Chancellor on the 20th and 21st May, 1885, who, after hearing the evidence, found

that on the facts and the law the petitioners were entitled to the relief prayed, and a decree was signed, whereby "it is ordered, adjudged and decreed that said John Fowler & Co. may at any time enter said Heeia Plantation and may remove all of the railroad track, cars, material and appurtenances there situated, according to the schedule annexed to said motion, except six thousand twenty-one thousand two hundred and fifty-sevenths thereof ($\frac{21,000}{1,000,000}$) to be designated by appraisers thereby appointed."

From this decree the receiver and Grinbaum & Co. appeal, which appeal came on and was argued at the present term.

F. M. Hatch, for petitioners.

The sale was a conditional sale, no property passed.

"When by agreement of parties the property does not vest in purchaser until the purchase money is paid, the vendor may, if money is not paid, recover the property from the vendee or from one who holds it under a mortgage or sale from him." *Benner vs. Puffer*, 114 Mass., 376, *Coggill vs. Hartford and N. H. R. R.*, 3 Gray, 545, *Zuchtman vs. Roberts*, 109 Mass., 53, and cited many other cases and authorities to the same effect, and contended that the evidence fully supported the decree.

A. S. Hartwell, for the Receiver and Grinbaum & Co.

The burden of proof of the alleged contract is on petitioners. We question the contract. The transaction as alleged is a mortgage, not a sale. (*Fosdick vs. Car Company*, 99 U. S. 256.) Such a contract is contrary to good policy. We do not ask that *Raymond & Wilshire vs. Dole & Wilcox*, 4 Hawn., 232, be reconsidered, but it should be confined to exact cases. We do not deny authority of cases so far as they go. This was not a bailment, because there was part payment; condition, if any, was waived. Waiver is an act done or allowed not to be done to the prejudice of another. There is no sufficient evidence to support claim as to property in railroad, etc., being in vendee and mortgagee. *Newhall vs. Kingsbury*, 131 Mass., 445.

In this case we have to consider, first, what is the law governing the case? Second, whether the evidence before the Court is sufficient to satisfy us that the sale was a conditional one, as alleged.

As to the law, this Court has, in the case of *Raymond & Wil-*

shire vs. Dole, Assignee, adopted the principle contended for by the petitioners, and without saying that we should go as far as some of the cases cited for the petitioners, we should feel bound if the evidence were direct and unequivocal to support the alleged contract, but such evidence should be positive and certain in its details as to the terms and stipulations of such contract.

The learned Chancellor had the advantage of hearing the evidence and of seeing the witnesses. We have only the written testimony before us, which has perhaps lost some of its effect in transcribing, and feel bound to give full effect to and support the finding of the learned judge, if we can satisfy our minds that the evidence is such as to leave even a favorable doubt upon the effect of such testimony.

Neisser says he was business manager from October, 1882. ("The cars and railroad tracks were ordered by McKeague, through Macfarlane & Co. McKeague told me so. No railroads on the place when I went there. Delay in delivering tracks. The railroad was to be delivered in time for the crop of 1882-3 and the railroad was to be considered as the property of Fowler & Co. until paid. The railroad was not put into general plantation account. The understanding was that the railroad was to be paid for after it was finished and delivered. There was no written agreement about it and no definite time set for payment. No term of credit agreed upon that I know of." On cross-examination the witness said: "I was in San Francisco at the time the locomotive was taken to the plantation. It must have come over in October or November. I don't know that McKeague made the bargain for railroad. I did not order it nor did the Heeia Company. During the delivery of the railroad material at Heeia Macfarlane was there and said to me: 'You know, Mr. Neisser, that the railroad shall remain as the property of Fowler & Co. till paid.' I told him I was aware of that arrangement between McKeague and him. I did not inform Grinbaum & Co. of this nor that it was not paid for. The arrangement for the continued ownership of the railroad by Fowler was made by McKeague in the first place and afterward by me. McKeague did not tell me of the arrangement. I can't remember exactly who told me. Can't remember when the talk was with Macfarlane. Delivery of railroad iron

commenced in October or November, 1882, and is not completed yet. (September, 1884.) I think it was after we bought that I heard of the arrangement." (The purchase was 30th June, 1882.)

Henry R. Macfarlane says: "Our firm are agents for J. Fowler & Co.—were so in 1882-3, when order for railroad was given. R. H. Fowler of J. Fowler & Co. was here in Honolulu. McKeague wanted a railroad; he talked with Fowler about it before place was incorporated, before transactions with Neisser. It was about a year before the road was delivered, some time before that—from six months to a year—(delivery commenced October, 1882.) McKeague wanted railroad—was not quite certain whether it would work among hills. Fowler said their tramway would work there; would guarantee it to work if their engineer constructed road. He was anxious to have a road there because planters from other islands could go there easily and see how it worked. Understanding was that he would guarantee the road—payments were to be made easy—the understanding was that the road was to be Fowler's until it was paid for. They had a lot of railroad stock here. As soon as crop was off the road was to be laid—cars and locomotive to be sent out afterward. It was mostly a permanent track. They got portable tracks afterward—it's all in the bill. We were agents for McKeague plantation at the time. First delivery was about latter part of 1882. This is a correct account of what was sent over. Neisser was in charge of plantation; told him I would like something on account. I suppose he understood the road was to be Fowler's until paid for. I asked him and he said he understood it so. He gave me \$6,000 on account. I suppose if it hadn't worked it would have been Fowler's loss. There would have been trouble in settlement. The railroad has not all been delivered—the agency was changed. We thought we ought to have more payment, so we held on to locomotives, rails and cars. The locomotive has since been delivered to Grinbaum & Co. and paid for by them. We didn't deliver it because we hadn't got the payments as promised." On cross-examination he says: "The conversation with Neisser about road being Fowler's until paid for was here in town, before we began to deliver. He promised he would pay along as crop came in. Neisser promised this. McKeague made no agreement as to time and manner

of payment. Agency was transferred 22d August, 1883. All my agreements about railroad were made with Neisser. He reiterated McKeague's order—it was along in 1882, shortly after the affair was turned over to the corporation; we talked it over before he went to California. The arrangement with Neisser was that road should be Fowler's till paid for and Neisser should do the best he could with the crop. Most of the railroad business was verbal between Fowler and McKeague, Neisser and myself. I did not appropriate part of the \$47,000 to pay for railroad, because they—i. e., Frank and Neisser—wanted us to be easy about it; it would be settled after the crop came off. As the railroad was ours, and as Grinbaum & Co. were making advances, that was the best they could do. I went to Heeia with Fowler and McKeague. Fowler said he would guarantee road if his engineer built it."

Captain John Ross says: "Have been manager of Heeia Plantation from November, 1882, till February 1, 1884. Neisser employed me—objected to Neisser as to direction of line. He answered I must get along as best I could as road was laid out by Fowler & Co.'s engineer and was to be in their hands until tested and paid for. Was present at conversation between Neisser and Henry Macfarlane. I heard if the road was not a success it was to revert to Fowler & Co.—remember once distinctly—may have been more."

G. W. Macfarlane—"Can't recollect exact date of my first conversation about the railroad. It was before I went to England—in 1882, I think. There was more or less talk between McKeague and my brother Henry; he attended to Heeia matters. There was an arrangement between Fowler and Neisser about putting a railroad on Heeia plantation. They were to guarantee working of road. It was to be done at Fowler & Co.'s risk. If not satisfactory it was to be thrown back on their hands. It was arranged between Henry Fowler and myself, in England, that the matter of putting road down, payments, etc., were to be left to my brother Henry and Neisser. It was agreed that road was to be put down by Fowler's engineer, expense of engineer to be paid partly by Fowler and part by plantation, and after road was paid for it was

to pass over to the plantation. This arrangement was arrived at because we could not undertake to guarantee the account. As agents of the plantation our advances were sufficiently large. We did not care to take an extra burden, and we had not means then at our command to make advances for this purpose. Fowler who was out here and his uncle in London agreed to this arrangement. At time of transfer Frank and Selig came in the office and notified us they were ready to take up balance of account. He had arranged with Henry that railroad was to be an outside matter to be paid for out of crop, and that they were to have a year's time on the mortgage. Selig was standing there with Frank." Cross-examined. "The mortgage was for all plantation property. We could not include railway, because it belonged to Fowler & Co.; we could not take mortgage for railroad, because it had not passed to Heeia Plantation.

(Mortgage is dated 2d July, 1881.)

On this evidence can it be said that the alleged contract is proven.

To say the least, according to the evidence of the two Macfarlanes, it was a very loose and unbusiness-like transaction. The contract involved property to the amount of nearly thirty thousand dollars and could not have been completed within a year. Yet nothing in writing passed between the parties. According to the evidence on behalf of the claimants, the railroad was to be taken back if not a success.

Neisser's evidence should be looked at with great caution. Grinbaum & Co. had commenced proceedings for foreclosure, a receiver had been appointed and Neisser was ousted from the management, and he does not fix any definite dates and cannot remember from whom he first heard that the property was to remain Fowler's until paid for.

Henry Macfarlane says that the matter was first spoken of about a year before delivery commenced, or about six or eight months before incorporation. Now the conveyance from McKeague to Neisser was on the 30th June, 1882, so that it would appear that this time is about correct, as delivery commenced in October, 1882.

G. W. Macfarlane's testimony is important if correct. But we

think he is mistaken, because he says that the conversation with Neisser was just before he left for England in 1882; he does not fix the time, but from inquiries made and from official sources within reach, it is ascertained that he left on the 26th September; Neisser left with McKeague on about the first of July. McKeague returned on the 4th September, and Neisser did not return until some time in October and after Macfarlane left. We think from the evidence he is also mistaken as to the presence of Selig with Frank at the time the draft for the balance was given and consequently as to the conversation stated to have taken place in Selig's presence.

And now we come to a part of his testimony which satisfies us that neither his nor Henry Macfarlane's testimony is reliable. He says "It was arranged between Henry Fowler and myself in England that the matter of putting down the road, payments, etc., were to be left to my brother Henry and Neisser, and after road was paid for, it was to pass over to the plantation. Fowler who was out here and his uncle in London agreed to this arrangement." Now, as G. Macfarlane left at the date mentioned, delivery must have commenced before this arrangement was made in England, and it was made by the Fowlers with their own agent who was not in a position to guarantee the account.

Neisser's conduct in concealing from his agents Grinbaum & Co. the alleged contract, although they were advancing sixty thousand dollars and carrying on the plantation, does prevent us from giving much credence to his testimony.

Again, G. W. Macfarlane says that the railroad was not included in their mortgage because it was Fowler's property and had not passed to the Heeia Plantation. This has been offered as tending to induce the Court to support the alleged contract, whereas it has an entirely opposite effect with us, as the mortgage was given in July, 1881, long before any negotiation was had respecting the railroad and consequently it could not have been included in the mortgage. It is an instance of loose and reckless statements being made without consideration.

Feeling as we do that this claim has not been proved, and that to allow it would be contrary to public policy and injurious to the rights of third parties, we have come to the conclusion that the

decree appealed from should be reversed and the petition and motion dismissed, with costs in this Court and in the Court below.

F. M. Hatch, for petitioner.

A. S. Hartwell, for respondents.

Allioli Hale, 29th July, 1885.

JOHN NOTT *vs.* N. F. BURGESS *et al.*

APPEAL FROM THE CHANCELLOR.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

If there is no express stipulation to the contrary, the right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage; only the right to redeem passes to the assignees in Bankruptcy of the mortgagor.

Kallon vs. Robinson, 2 Haw., 227, approved.

Demurrer to a bill in equity sustained, on the ground that plaintiff had an adequate remedy at law; distinguishing *Ahuna vs. Kauhikaua*, 3 Haw., 730.

Decree affirmed.

DECISION OF THE CHANCELLOR, APPEALED FROM.

This is a bill of John Nott, a mortgagee of certain goods, being the tools and stock in trade of one C. Smith, a tin-smith and plumber in Honolulu, alleging that the mortgaged property remained in possession of said Smith until May 15th when he surrendered possession to the mortgagee and gave him a bill of sale of said property. That on the next day Smith under duress executed and delivered to N. F. Burgess an assignment of all his property including said mortgaged property: That thereafter Burgess took forcible possession of the goods and now holds them and refuses to deliver possession of the goods and claims the right to sell them and has sold some of the goods, and that Theo. H.

Davies & Co., creditors of said Smith, threaten to put him into bankruptcy, and take possession of the mortgaged property. The bill alleges threatened irreparable injury to his security and loss of the mortgaged property and prays for an injunction against the defendants disposing or interfering with the mortgaged property, or bringing proceedings to take possession of it: That the Court ascertain and determine the property covered by the mortgage and order defendants to deliver the same to a Receiver with proceeds of sales of said mortgaged property.

It is not claimed by the plaintiff that the injunction would prevent any creditor from commencing proceedings to adjudge Smith a bankrupt.

The demurrer of Theo. H. Davies & Co. raises the question whether an assignee in bankruptcy is entitled to the possession of the mortgaged property as against the mortgagee. The question would seem to be prematurely raised, as *non constat* that proceedings in bankruptcy will be begun; but the demurrer raises the question fairly enough on the allegation that these proceedings are threatened. Certainly if Smith is declared a bankrupt, an order to the Marshal to take possession of his goods will issue as a matter of course.

I think the law is well settled that if there be no express stipulation to the contrary, the right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage, whether the mortgage be due and payable or not. See Jones' Chattel Mortgages, Sec. 426 and numerous cases there cited.

It was also held in *Fallon vs. Robinson et al*, 2 Hawn. 227: The Court says that only the right to redeem passed to the assignees in bankruptcy, provided the mortgage was valid.

The title is vested by the mortgage in the mortgagee subject to be defeated by a condition subsequent, *i. e.* payment.

Chief Justice Shaw said in *Coles vs. Clark*, 3 Cush. 401, "We must take it as settled, that a mortgage of a chattel vested a property in the mortgagee; not an absolute title, indeed, but a present title, defeasible upon a condition subsequent. An actual delivery and change of possession is not necessary to perfect the mortgagee's title; if the mortgage is duly recorded, the registration of

the mortgage supersedes the necessity of an actual delivery and gives all parties concerned constructive notice of its execution or existence. * * * Another consequence of this relation is that, as a general rule, the right of possession follows the right of property, and, therefore, where there is no restraining stipulation, the mortgagee, having the right of property until defeated by the performance of the condition, has as incident thereto the right of possession and may therefore take the goods into his own custody, or maintain trespass or trover for them, against any one who takes or converts them to his own use."

See also *Boise vs. Knox*, 10 Met. 40. *Landon vs. Emmons*, 97 Mass. 38. *Hall vs. Sampson*, 35 N. Y. 274.

As to the demurrer of Burgess, the principal point raised is that equity has no jurisdiction since there is a complete and adequate remedy at law. It is clear from what has been already said that the mortgagee Nolt has the right to immediate possession. The mortgage does not stipulate that the mortgagor is to retain the possession and, as we have seen, in absence of any such stipulation the mortgagee has the right to immediate possession. It is also clear, as we have seen, that the mortgagor can maintain trespass or trover against any one who converts the goods, or replevin, as the case may be.

In *McKibbin vs. Spencer*, 3 Haw., 574, this Court sustained a demurrer to a bill in equity on the ground that the allegations showed a cause of action in trespass only, and it did not appear from the bill that the defendant was committing great and irreparable injury and was incapable of responding in damages. As there stated, "the consideration and principle upon which the Court interferes by way of injunction rests upon irreparable injury."

In *Jones on Chattel Mortgages*, Sec. 450, the author says, "the mortgagee is not entitled to an injunction restraining a sale of the mortgaged property under execution by a creditor of the mortgagor, when the property was in the possession of the mortgagee when it was seized, provided that the property is such that its value is ascertainable and measurable in money, for in that case the remedy at law is inadequate"—quoting from an Illinois case.

An exception to this rule exists where the chattels are articles of antiquity or curiosity, memorials of affection, etc. But in our

case the value of the chattels is ascertainable and is wholly measurable by money.

No injury can be said to be irreparable which can be compensated by damages. There are no allegations in the bill by which the contrary might appear nor does the bill allege that Burgess is incapable of responding in damages.

Jones on Chattel Mortgages, however, quotes from some Maryland and New Jersey cases in which the courts hold that a mortgagee, in case of apprehended danger of loss of the mortgaged property, may have a receiver appointed, even before his right to foreclose had accrued, in order to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage.

See Jones, Sec. 451 and Sec. 787, where it is stated that "the general rule is that a receiver may be appointed, although the mortgagee has the legal title and might enforce his possession at law, whenever equitable grounds for such relief can be shown, among which are inadequacy of property to secure the debt, the insolvency of the mortgagor, and danger that the property will be lost or materially injured." The cases from which this is derived are not accessible to me, and I am not satisfied with their reasoning, and I see no equitable grounds alleged in this bill why the mortgagee cannot be fully indemnified by legal proceedings. There is no schedule of the mortgaged property annexed to the mortgage, and the difficulty suggested, of picking out the mortgaged chattels from the other property of the mortgagor, would exist in an action at law as well as in equity.

I am aware that this Court in *Ahuna vs. Kauahikaua*, 3 Haw., 730, in decreeing specific performance of a contract for sale of a rice crop, went quite far in sustaining the jurisdiction of equity where it seemed the party injured could be compensated in damages. But the Court say that there was a doubt whether the plaintiffs would have an adequate remedy, as it was uncertain what the quantity or quality of the crop would be until it was harvested.

On the ground, therefore, that the plaintiff can obtain full compensation at law, I think the demurrer should be sustained. The other points raised I do not consider material.

Honolulu, June 22, 1885.

OPINION OF THE FULL COURT, BY PRESTON, J.

This is an appeal by the plaintiff against a decree made by the Chancellor, on the 22d day of June last, whereby he dismissed the bill for want of Equity.

On a perusal of the papers in the case and the opinion of the Chancellor, we think the decree was properly made; at the same time we adopt the principle stated by the Chancellor, as to the effect of a chattel mortgage upon the property comprised therein.

The appeal is therefore dismissed with costs.

Kinney & Peterson, for plaintiff.

F. M. Hatch, for Theo. H. Davies & Co.

Ashford & Ashford, for Burgess and Smith.

Honolulu, December 16, 1885.

J. R. SILVA *et al* vs. A. J. LOPEZ *et al*.

APPEAL FROM DECREE OF AUSTIN, J.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

A sale under a power in a mortgage having been set aside for irregularity: held that in the action to set aside the sale, neither the mortgagor, under a prayer for general relief, nor purchasers at the sale, could recover consequential damages from the mortgagee on account of the illegal sale.

Decree appealed from set aside and new Decree made.

OPINION OF THE COURT, BY PRESTON, J.

THIS is a suit brought to set aside a sale of real and personal property made by the defendant Lopez, under a mortgage from the plaintiffs.

The Bill prays that the sale, which was held on the 8th day of July, 1884, be adjudged illegal and void, and that no property rights passed thereby; that all deeds and conveyances executed

in pursuance of said sale be cancelled ; that the defendants come to a just and true account with complainants in the premises ; that the property sold be restored to complainants according to their respective rights, or if such return be impossible, then that such property as should not be returned be compensated for in cash by defendants or either of them ; that said mortgage be released and cancelled, the complainants offering to pay the mortgagees or other parties in interest what might be found owing on account of the mortgage.

The Bill also prayed an injunction and general relief.

An injunction was granted until further order, restraining the defendants from selling or disposing of the property comprised in the mortgage.

The defendants Lopez, Brown and Rosa answered the Bill. Defaults were entered against the other defendants.

On the ninth of October, 1884, the late Mr. Justice Austin rendered his decision, whereby he set aside the sale and directed the conveyances thereunder to be cancelled, the animals still remaining unsold by the purchasers to be given up to the plaintiffs, those not forthcoming to be accounted for by the purchasers on reasonable terms, proofs relative to the same and values, and also expenses of returning the animals, to be taken before the Clerk, an equitable decree to be made on the report : a computation of the amount due on the mortgage to the end that the plaintiffs might pay the same in full : a proper decree to be signed on presentation.

From this decision the defendant Lopez appealed and, on the 10th of December, a decision of the Full Court was filed affirming the decision of the Court below. See *ante*, page 262.

No decree has been drawn up by the plaintiffs either on the decision on the original hearing or on that of the Appellate Court.

Nothing further appears to have been done in the matter until the 27th day of January, 1885, when a decree, styled an interlocutory decree, was signed by Mr. Justice Austin, as follows :

"This cause having come on before the Court for hearing and determination, and the Court having heard and considered the evidence and arguments of counsel adduced on the part and in

behalf of the said parties complainant, and parties defendant who answered the Bill of Complaint herein, respectively :

"It is ordered, adjudged and decreed by the Court as follows, to wit :

"1st. That all deeds of conveyance of real or personal estate made by or on behalf of said defendant Antonio J. Lopez of property conveyed to said defendant by a certain deed of mortgage dated August 13, 1883, executed by the said parties complainant hereto, shall be and the same are hereby annulled, revoked, avoided and cancelled.

"2d. That each and every of the said parties defendant shall at once, upon demand of said parties complainant or their agent or attorney, and the production by such demandant of a certified copy of this order, yield up and deliver to such demandant the possession of all and singular such real and personal property by said parties defendant respectively purchased or acquired, at or by virtue of a sale held on the to wit 8th day of July, 1884, of certain of the property mentioned in and conveyed by the deed of mortgage aforesaid, as is now or was at the date of the service of the summons herein in or under their respective possession or control."

It is apparent that this decree does not follow or carry out the previous decisions, and is not in accordance therewith. No provision is made for any inquiry as to the amount due on the mortgage, nor any provision for its payment, nor any direction as to an account or inquiry as to the value of property not returned. The defendant Lopez's rights seem to be practically ignored. Certain orders were afterwards made directing inquiries as to the value of parts of the property sold at auction and not returned to the plaintiffs, and as to the damages sustained by the plaintiff Silva "or any of the parties to the action from the acts of any other party or parties to the action, arising out of or because of said sale," and long and complicated inquiries were made and much evidence taken before the Clerk as to the value of the property not returned at the time of the sale, and as to the loss to the plaintiff Silva by the stoppage of his business, and other consequential damages, also as to the damages sustained by the co-defendants Cunha and D'Andrade by the return of the property purchased by them.

On the 9th June, 1885, an order was made whereby the late learned Judge awarded the plaintiffs \$1,320 as the value of the horses and cattle not returned, and also the following sums :

Loss of profits from dairy business	\$ 350 00
Loss of use of four oxen.....	300 00
Permanent loss of dairy patronage.....	350 00
Loss of pasturage in Hui of Manoa.....	52 00
Loss of leased pasture land.....	500 00

which sums, amounting altogether to \$2,872, were adjudged to be paid by defendant Lopez to the plaintiffs.

The defendant Cunha was awarded the sum of \$834 00, made up of \$400 00, the price paid for cattle returned by him under the order of the Court, expenses driving and delivering the same, and increased value thereof.

The defendant D'Andrade was awarded the sum of \$1,354 00, made up as follows :

Cash paid for lease.....	175 00
Cash paid for 20 cattle.....	390 00
Expense of receiving.....	6 00
Expense of delivering.....	10 00
Paid taxes on cattle.....	2 50
Paid taxes on land.....	7 50
Rent of leased land.....	120 00
Making lease and Bill of Sale.....	18 00
For increased value of cattle....	300 00
For increased value of lease.....	325 00

Mr. Justice Austin died without signing any decree.

The defendant Lopez appealed.

On behalf of the appellant it was contended :

1. That the Court had no jurisdiction to award general damages ; the defendant Lopez cannot be deprived of his right to trial by jury.

The only question properly referred was the value of the live stock not returned. This was properly made. An award of general damages cannot be supported. A plain distinction is to be drawn between compensation for a deficiency and general damages.

Story Eq. Jur. Sec. 791, 796.

There is no prayer in the bill to justify an enquiry into damages. The decree should follow the relief prayed for.

Manu vs. Campbell, 4 Hawn., 498.

Story Eq. Pl. Sec. 42.

No decree should be made which does not order payment of amount found to be due on the mortgage.

The finding as to the value of the horses should be revised.

No decree can be made on this bill in favor of the co-defendants D'Andrade and Cunha. The form of the bill does not authorize it. *Graham vs. R. R. Co.*, 3 Wall. 704, does not support the dictum of the learned Judge.

For the plaintiffs it was contended at great length and with much persistence that the prayer for general relief warranted the Court in awarding damages flowing from the wrongful acts which form the basis of the complaint.

Pomeroy's Eq. Jur. Sec. 237.

Story's Eq. Jur. Sec. 794, 796.

The authorities are unanimous in holding that a prayer for general relief is a sufficient basis for any or all such relief as is agreeable to the case made by the bill. Even "if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief."

Story's Eq. Pl. Sec. 40, 41, note 2.

Cook vs. Martin 2 Atk. 3.

Mitford's Eq. Pl. (Ed. 1882) 132, 133.

The same conclusion may be reached by the doctrine that equity will exercise its powers to prevent a multiplicity of suits.

BY THE COURT:

We have considered the several points and arguments advanced on behalf of the parties and are of opinion that the plaintiff J. R. Silva and the defendants D'Andrade and Cunha are not entitled to the resulting damages claimed and awarded to them.

It is true that under a prayer for general relief the Court may give such relief as it may think the plaintiff is entitled to on the case as made out at the hearing. But in this case the Court gave the plaintiffs all the relief asked for by their bill, and no further

relief was asked for at the hearing, or by the bill itself, and had it been asked for we do not think it should have been granted.

We think the decree of the 27th day of January was made in error, that it is not in accordance with the decisions of the learned Judge (Austin) and of the full Court, and that all proceedings under it were irregular.

This matter has now been before the Court for more than a year, and the defendant Lopez having been restrained from realizing his security, we think it advisable to deal with the whole case now, and thus avoid further delay and expense to the parties.

On a review of the testimony taken at the hearing and before the Master, it appears that the plaintiff Silva was present at the sale and so far from objecting, he then and subsequently delivered parts of the property sold (cattle and horses) to the purchasers.

Under the original decision, which was affirmed, Silva is entitled to have the property returned to him or to be paid its value, but no more, neither do we think that under the circumstances of the case as made, either he or the defendants Cunha and D'Andrade can recover for consequential or resulting damages.

We think, on an examination of the testimony, that the amount awarded to the plaintiffs for the value of the cattle and horses not returned is too much, and therefore allow to the plaintiff Silva the sum of \$1,200 instead of \$1,320, for such value.

We allow to the defendant Cunha the sum of four hundred dollars, the amount paid by him for the cattle returned by him, also the sum of \$40 for expenses of driving the cattle to Waimalu and returning same, making together \$440 with interest at the legal rate. We disallow the other items as not recoverable.

We allow to the defendant D'Andrade the sum of \$175, cash paid for the lease purchased by him, also \$390 for 20 head of cattle, \$16 for receiving and delivering the cattle, \$120 for rent paid by him, and \$18 expenses of lease and bill of sale, making altogether the sum of \$719, with legal interest. We disallow the other items as not recoverable.

An account must be taken of the amount of principal and interest due to the defendant Lopez under his mortgage, in which account he must be allowed the sum of \$120, ordered to be paid to the defendant D'Andrade for rent, and after deducting the sum

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of \$1,200 with interest at the rate specified in the mortgage, the balance must be paid by the plaintiffs to Lopez.

The property comprised in the mortgage must be sold under the direction of one of the Judges of the Court, at the expiration of one month from the date the balance is ascertained and proceeds paid into Court, unless the amount found to be due is previously paid.

Each party to pay his costs of this appeal and of all proceedings subsequent to the decision of this Court of the 10th December last. The defendant Lopez to pay the complainants' costs of the suit up to and including the first appeal.

A decree embodying the foregoing orders and directions will be prepared and may be perused by the parties before final signature.

Ashford & Ashford, counsel for plaintiffs.

F. M. Hatch & Cecil Brown, for defendant Lopez.

Jona. Austin, for defendants Cunha and D'Andrade.

Dated, Honolulu, October 6, 1885.

JOHN M. HORNER vs. CLAUS SPRECKELS.

APPEAL FROM DECISION OF AUSTIN, J., OVERRULING DEMURRER.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

W. Y. Horner, having made a planting contract with defendant, assigned an interest in the contract to his brother, J. M. Horner, who brought suit against defendant for breach of the contract.

Held that J. M. Horner, by the assignment, became, not a tenant in common with his brother, but a joint contractor, and therefore W. Y. Horner should have been joined as a co-plaintiff.

Decision appealed from Reversed.

OPINION OF THE COURT, BY PRESTON, J.

THIS action is brought to recover the sum of \$31,902 82 damages alleged to have been sustained by the plaintiff in consequence of the alleged breach of an agreement for planting and grinding cane.

The complaint alleges that the defendant on the 19th January, 1880, agreed with one William Y. Horner that in consideration that said W. Y. Horner or his assigns should for the term of seven years thereafter plant with sugar cane at least two hundred acres of land in each year during the said term for the defendant, upon the Island of Maui, and cultivate, irrigate and strip the same and deliver the same to the defendant during the seasons when the cutting of cane should be going on and when the defendant should be ready to receive and grind the same, he, the defendant, would furnish for the irrigation of said cane such supply of water as in the opinion of the defendant or his agent should be sufficient to irrigate said cane, and should make a fair distribution of water, in case of scarcity thereof, between the cane planted and cultivated under said agreement by the said William Y. Horner and his assigns and all other cane upon the defendant's lands requiring irrigation from the sources of water available therefor. And further, that the defendant would grind and make said cane into sugar and deliver to the said W. Y. Horner and his assigns one-half of the said sugar during the first year of the said agreement, and one-third thereof thereafter.

The declaration then avers an assignment on the 1st June, 1880, by said W. Y. Horner to the plaintiff, with the consent of the defendant, of one undivided half of his interest under said agreement.

And that said W. Y. Horner until the assignment, and the plaintiff and W. Y. Horner thereafter, did and performed all things required by said agreement to be done and performed on the part of the said W. Y. Horner and his assigns.

Breach. That the defendant from and after about the 4th March, 1883, did not furnish for irrigation of said cane such supply of water as in the opinion of the defendant or his agent was sufficient to irrigate said cane, and did not make a fair distribu-

tion of water between the cane so planted and cultivated under said agreement and all other cane upon the defendant's land requiring irrigation from the sources of water available therefor, but wholly failed, neglected and refused so to do; by reason of such failure, neglect and refusal of the defendant about 260 acres of sugar cane planted under said agreement became withered, dried up and woody, and of little value, so that the sugar produced therefrom was about 830 tons less than would and could have been made therefrom had the said cane been by the defendant furnished with water for irrigation, according to his said agreement.

And further, that plaintiff devoted much time, labor and skill to the planting and cultivating of the cane and expended thereon large sums of money.

The declaration alleges performance of conditions precedent and claims to recover the amount claimed.

To this declaration the defendant demurred, on the ground of the non-joinder of W. Y. Horner as plaintiff.

The demurrer was argued before the late Mr. Justice Austin, who overruled the demurrer.

The defendant appealed from his decision.

On behalf of the defendant it was claimed that by the assignment the plaintiff became a joint contractor with W. Y. Horner, and therefore it was necessary to make W. Y. Horner a co-plaintiff.

On behalf of the plaintiff it was contended that the plaintiff by the assignment became a tenant in common with W. Y. Horner, and as such could sue separately.

The following authorities were cited or referred to:

Chitty on Pleadings, Vol. 1, pp. 9, 10, 11; *Petrie vs. Bury*, 3 B. & C., 353; *Foley vs. Addenbrooke*, 4 A. & E., 205; Addison on Contracts, Vol. 1, p. 39; *Moody vs. Sewall*, 14 Me., 295; *Tylee vs. McLean*, 10 Wend., 374; *Dunlop vs. Gregory*, 10 N. Y., 241; *Walls vs. Hinds*, 4 Gray, 256; *Thompson Bros. vs. Halawa Sugar Company* (In Equity before McCully, J.; not reported); *Declin vs. Mayor of New York*, 63 N. Y., 17; Pomeroy's Civil Remedies, Sec. 185; *Cruger vs. McLaury*, 41 N. Y., 219; *Jones vs. Fitch*, 3 Bosw., 63; *Porter vs. Bleiter*, 17 Barb., 149; *Crawford vs. Green*, 35 Ia., 543; *Hasbrouck vs. Bunce*, 3 N. Y., 311; *Hubbell vs. Lirch*,

58 N. Y., 241; *Wells vs. Cone*, 55 Barb., 585; *Van Horne vs. Crane*, 1 Paige, 455; *Holland vs. Weld*, 4 Greenleaf, 219; *Tate vs. Citizens' Insurance Company*, 13 Gray, 82; *Skinner vs. King*, 4 Allen, 498; *Crompton vs. Jones*, 4 Cowen, 18; *Tiernan vs. Jackson*, 5 Peters, 580-597.

On a review of the authorities and after reading the opinion of the late learned judge we are of opinion that this decision, which appears to have been formed under the assumption that the plaintiff and W. Y. Horner were tenants in common, was erroneous.

We think that by the assignment to the plaintiff—with the assent of the defendant—of one undivided half interest in the agreement, a new contract was made between W. Y. Horner and the plaintiff on the one side, and the defendant on the other, to perform the several works upon the terms of the original agreement, and that, consequently, W. Y. Horner should be joined as a plaintiff.

The plaintiff seeks to recover the whole damages alleged to have been sustained, and which, it is admitted on behalf of the plaintiff, W. Y. Horner could not himself do.

The judgment, therefore, is that the decision appealed from be reversed, with costs of this appeal and in the court below.

The plaintiff to have leave to amend as he may be advised within twenty days on payment of costs.

A. S. Hartwell and *Jona. Austin*, for plaintiff.

Paul Neumann, and *F. M. Hatch*, for defendant.

Honolulu, July 21, 1885.

YEE TONG SEU *et al.* vs. HEE PING *et al.*

EXCEPTIONS TO RULINGS OF AUSTIN, J.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Ejectment having been brought against several defendants claiming under different titles; held there was no misjoinder of defendants. Plaintiff having discontinued as to some of the defendants, the Court instructed the jury that they might find damages against the other defendants; held, under the evidence, erroneous, as plaintiffs could only claim title from the time their right of possession accrued; but there being no advantage in again trying the title, judgment for possession is allowed to stand, if plaintiffs file a *remittitur* of damages.

Exceptions sustained.

OPINION OF THE COURT, BY PRESTON, J.

THIS case comes up on a bill of exceptions to the rulings of the late Mr. Justice Austin on the trial of this cause before a foreign jury at the last April term.

It is an action of ejectment, and the plaintiffs claim that the defendants, nine in number, "have unjustly and contrary to law and the rights of the plaintiffs taken into their possession and converted to their use and occupation all that land situate in said Honolulu awarded to one Kiha by Royal Patent No. 1119," and the plaintiffs state their title to be a term of ten years by virtue of lease dated March 9, 1885, from Paona and others to the plaintiffs, (the term being ten years from 28th January last.)

The plaintiffs claim restitution of the property with damages for its detention, and lay their damage at \$500.

The action was commenced on the 13th of March.

The plaintiffs obtained a default for failure to answer, which was afterward, on the 7th April, vacated on the motion of Mr. Hartwell on behalf of the defendants Hee Ping and Chung Tai Hoon, and of Mr. Thompson on behalf of Kun Chee.

Chulan & Co. were admitted to defend as the landlords or em-

ployers of Hee Ping and Chung Tai Hoon, claiming to be entitled to part of this land under a lease from Kaanaana, an alleged tenant for life.

The other defendants claimed to hold the remainder of the premises under another lease from Kaanaana.

At the trial it was proved that the lessors of the plaintiffs were the heirs at law of Kiha, the patentee.

That Kaanaana, the alleged tenant for life, died on the 29th day of January last.

That the defendants Chulan & Co. were in separate possession by their servants Hee Ping and Chung Tai Hoon of the portion of land comprised in their lease, being part of the premises claimed, and there was a fence between Chulan & Co.'s lot and the rest of the land.

It was also proved on behalf of the plaintiffs that Chulan & Co.'s lot was worth \$45 per month and the residue \$60 per month.

At the conclusion of the plaintiffs' case, the defendants Hee Ping, Chung Tai Hoon and Chulan & Co. moved for judgment, on the ground that the declaration was against them jointly with the other defendants, while the evidence showed a several occupancy of two several lots under two separate leases, with no joint occupancy or joint wrong, and duly excepted to the refusal of the Court to grant such motion.

The Court thereupon ordered that the plaintiffs might discontinue as to damages against all the defendants but Hee Ping and Chung Tai Hoon and Chulan & Co., which discontinuance the plaintiffs filed and the defendants mentioned duly excepted.

On the argument, Mr. Hartwell for his clients urged that the Civil Code, Sec. 1144, did not allow of the joinder of several defendants, as in this case, for each was liable only for detention of the several lots held by him.

The Court was referred to *Murphy vs. Campar*, 33 Mich., 71; *Jackson vs. Hazen*, 2 Johns., 441; Chitty on Pleadings, Vol. 1, p. 86; Pomeroy's Civil Remedies, Sec. 282, and to the following passage in the judgment of the Court in *Fosgate vs. Herkimer Company*, 9 Barb., 296:

"When the possession is several, each relying on a separate title and separate defense, it would be just as proper to sue half a

dozen defendants on as many promissory notes as to allow him to proceed against half a dozen tenants of as many pieces of land."

Mr. Kinney, for the plaintiffs.

The defendants' motion was too wide, being for an absolute judgment; that supposing the defendants' contention to be correct, he should have asked for a nonsuit; and he submitted that by the weight of authority there was no misjoinder.

He cited *White vs. Pickering*, 12 Serg. & R., 435; *Fisher vs. Hepburn*, 48 N. Y., 41; *Jackson vs. Woods*, 5 Johns., 276.

On this exception we think the plaintiff's contention is correct.

The defendants were not entitled to have judgment entered for them absolutely.

The case of *Jackson vs. Hazen* is explained by Kent, C. J., in the subsequent case of *Jackson vs. Woods*, which latter is a direct authority for the plaintiffs, as are also the other cases cited for the plaintiffs.

The judgment of the Court in *Fosgate vs. Herkimer Company* is not in accordance with the decision in *Jackson vs. Woods*, but the judgment appears to have been rendered under the authority of the Revised Statutes of New York, p. 307, Sec. 29, which enacts that where "the action is against several defendants, if it appear on the trial that any of them occupy distinct parts in severalty or jointly, and other defendants possess other parcels in severalty, the plaintiff shall elect at the trial against which he will proceed, and a verdict shall be rendered in favor of the defendants against whom the plaintiff does not proceed."

The Court directed the jury (the plaintiffs having abandoned their claim for damage against all the defendants except Mr. Hartwell's clients) that they might find damages against Chulan & Co. and Hee Ping and Chung Tai Hoon from the 29th of January last until the 18th March, to which direction exception was taken.

We are of opinion that such direction was erroneous, as the plaintiffs could only claim title from the 9th March, from which day only the plaintiffs' right of possession accrued, but as we cannot see that any advantage will be gained by again trying the title, we will allow the judgment to stand for possession of the property, on the plaintiffs filing a *remittitur* of all damages within fourteen days, otherwise a new trial is ordered.

Honolulu, August 10, 1885.

KEKUKUKE vs. KELIIAA.

EXCEPTIONS TO RULINGS OF AUSTIN, J.

JULY TERM, 1885.

JUDD, C. J. and McCULLY, J.

PRESTON, J., Disqualified.

Plaintiff brought ejectment on a deed made by him to defendant's grantor, claiming that the deed was conditional on the undertaking of the grantee to support plaintiff during his life; at the trial the Court excluded evidence as to failure of support.

Held, that by the terms of the deed, (which was in Hawaiian), no estate upon condition was created or could be inferred; and therefore there was no forfeiture of the estate on account of failure to support, and the refusal of the Court to allow evidence of the failure of the grantee to support plaintiff was correct.

A liberal construction should be given to Hawaiian words, which are claimed to be equivalent to technical expressions in English or Latin.

Exceptions overruled.

OPINION OF THE COURT, BY McCULLY, J.

THIS was an action of ejectment to recover a part of the premises conveyed by the plaintiff by a deed to one Kela, a Chinaman.

The material parts of the deed, upon the construction of which the exceptions taken depend, translated from the Hawaiian language in which the deed is written, are as follows:

Know all men by these presents that I, Kekuke, and my wife, Kamokoi * * * in consideration of one dollar, to us in hand paid, in witness of this sale and conveyance, and in pursuance of our own wish and good purpose, and on account of the consent of Kela to take good care of us in respect to all things as long as we live, do hereby convey unto the said Kela, our son-in-law, and his heirs, executors, administrators and assigns forever, all that piece of land * * * with its appurtenances to Kela and his successors (*hope*), the said Kela to peaceably hold the land, and we relinquish all our rights therein, and all leases which we or

either of us have made of any part thereof are hereby cancelled by this deed, and the said Kela is hereby empowered to extinguish such leases and to lease the land.

In witness whereof, etc.,

Signed by the grantors.

The plaintiff's case was that he had not received support from the grantee, and the exceptions are to the refusal of the Court to admit evidence to this effect, and directing a verdict for the defendant.

The question for our consideration is whether the deed creates an estate upon condition, with forfeiture and a right of re-entry for a breach thereof.

The doctrine of conditional estates is discussed on principle in *Rawson vs. Inhabitants of School District, etc.*, 7 Allen, 125. Bigelow C. J. in citing authorities says: "The usual and proper technical words by which an estate (conditional) is granted by deed, are 'provided,' 'so as' or 'on condition.' So a condition in a deed may be created by the use of the words, 'si,' or 'quod si contingat,' and the like, if a clause of forfeiture or re-entry be added. Co. Litt. 204, A. etc. Duke of Norfolk's case etc., 1 Wood on Conveyancing, 290. In grants from the Crown and in devises a conditional estate may be granted when it is given or devised for a certain purpose or with a particular intention, or on payment of a certain sum * * * But such words do not make a condition when used in deeds of private persons. If one make a feoffment in fee *ea intentione, ad effectum, ad propositum* and the like, the estate is not conditional but absolute, notwithstanding. These words must be conjoined in a deed with others giving a right to re-enter or declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional."

There is, says the same authority, a difference between a deed made in consideration of an act to be done, or a service rendered, when the subject matter of the grant is in its nature executory, as an annuity to be paid for services to be rendered, in which case the failure to perform the services relieves from the further payment of the annuity, and a deed where the estate granted has passed. The above case is an exception.

Ordinarily, the failure of a consideration of a grant of land or

the non-fulfillment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate, the reason, as given by Coke, being that "the state of the land is executed and an annuity executory." A deed for the use of land on condition of support might be an instance of an executory grant, revocable on failure to support. The Chief Justice, in the case from which we have cited with some condensation and change of words, says an estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on consideration of supposed hardship or want of equity. The Court in this case held that a grant of land to a town "for a burying place forever," in consideration of 'love and affection, etc., is not a grant upon a condition subsequent.

In *Ayer vs. Emery*, 14 Allen, 67, a deed which was intended to provide for the support of an elderly couple, drawn in much more full and explicit terms than in the case at bar, was held not to create a defeasible estate. The warranty deed of the demandant's husband to the tenant was "in consideration of — dollars paid, and in consideration of the fulfillment of certain agreements herein mentioned to be performed and fulfilled by the tenant," and following the description of the premises "and this conveyance is upon the consideration that said Emery, his heirs, executors and administrators, shall well and truly perform all the agreements, etc." Yet the Court, referring to the case above cited from 7 Allen, by the same Chief Justice Bigelow, held that there being no apt and proper words to create a condition, no clause of re-entry or forfeiture, no provision that the deed shall be void in a certain contingency, and a failure to indicate any clear intent to cause the estate to be defeated by reason of any act or omission of the grantee, the deed could not be held as conditional, and although in this case the Court thought it might be said that the deed was of equivocal import, "yet it is perfectly well settled that an estate on condition cannot be created by deed except when the terms of the grant will admit of no other reasonable construction," and further say, in conclusion: "A court of law cannot vary the rules of construction to meet cases of hardship and injustice, however remediless they may be."

Labam vs. Carleton, 53 Me., 211, was decided upon reference to the reasoning and authorities of 7 Allen, first cited.

We should give a favorable construction to words and phrases in the Hawaiian language, which may be claimed to be the equivalent of necessary technical words in English or Latin, but by no liberality of construction can we find in the deed before us anything equivalent to the words of condition required by the authorities cited above. "Such phrases as 'on condition,' 'provided,' 'if it shall so happen,' are found in constant use, and if resorted to will remove any doubt as to the estate being on condition." Tiedeman on Real Property, Sec. 272; Washburn, R. P., Ch. XIV., Sec. 3.

Although, words not in terms creating a condition may create one, if followed by a clause reserving a right of re-entry in favor of the grantor in case of failure to carry out the intention thus expressed.

Washburn, R. P., Ch. XIV., Sec. 3; Tiedeman, R. P., Sec. 273; *Labam vs. Carleton*, 53 Me., 213.

The words of this deed are "in pursuance of our own wish and good purpose (*manao maikai*) and because of the consent of Kela to take good care of us in respect to all things as long as we live," and they are followed by no clause of re-entry. This must be treated as a part of the consideration. To hold it as a condition would be supported by no authority and would be contrary to the well-settled principles of law.

We further observe that this deed has no language imposing the execution of any supposed condition upon heirs and assigns. In such case the estate cannot be forfeited for any breach of the condition after the grantor has parted with the estate. Tiedeman, R. P., Sec. 273.

In *Page vs. Palmer*, 48 N. H., 385, held that in order to bind heirs or assigns to the performance of conditions subsequent they must be expressly mentioned in the condition. See also *Emerson vs. Simpson*, 48 N. H., 475; *Merrifield vs. Cobleigh*, 4 Cush., 178; *Fellows vs. Brown*, 42 N. H., 364; 4 Kent's Com., 130.

Reverting to the language of the deed in this case, it will be seen that the grantors made their support a matter of personal confidence in their son-in-law. Their deed contains no words

which can be construed to create a conditional estate by any even liberal and equitable construction, if that were allowable, but the law by all the authorities is that conditions annexed to estates going to defeasance being odious in the law must be construed strictly.

4 Kent's Com., 129; *Emerson vs. Simpson*, 43 N. H., 477; Wash. R. P., 447.

The ruling of the Court excluding evidence to show a failure of support, was correct and the exceptions are overruled.

Kinney & Peterson, for plaintiffs.

Cecil Brown, for defendants.

Honolulu, September 5, 1885.

NAMOMI and MAHOE, his wife, vs. AH NIU and CAROLINE,
his wife.

APPEAL FROM DECISION OF McCULLY, J.

JULY TERM, 1885.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

Plaintiffs, an elderly Hawaiian and his wife, sold to defendants two pieces of land, one belonging to the husband, the other to his wife, and subsequently claimed that they had been fraudulently induced to include both pieces in the deed, whereas they had only intended to sell that belonging to the wife.

Held that there being no conclusive evidence of inadequacy of consideration, or that plaintiff was incompetent to do business, or that any fraudulent representations were made, the deed cannot be set aside.

Equity will not relieve in the case of a bargain simply improvident.
Decree affirmed.

OPINION OF THE COURT, BY JUDD, C. J.

WE have carefully considered the evidence in this case and the

arguments of counsel, and see no reason why the decree of the Vice-Chancellor should be reversed.

The plaintiff Namomi sought the purchaser, and the evidence is strong that he sold the land which was already leased. The lease includes the parcel of land which the bill alleges was not intended to be sold.

We think the decree should be affirmed with costs.

W. R. Castle, for plaintiffs.

A. S. Hartwell, for defendants.

Honolulu, September 19, 1885.

DECISION OF McCULLY, J., APPEALED FROM.

The plaintiffs, who are elderly Hawaiians living in Koolaupoko, Oahu, complain that they have been fraudulently led to sign a deed which conveyed to the defendants the land comprised in two certain Royal Patents, based on kuleana awards, of which they were the holders, whereas they intended to convey but one of the premises. Royal Patent No. 1362 was the property of Mahoe, the wife, by inheritance; Royal Patent No. 2296 of Namomi. Both parcels of land were in the same ahupuaa of Kaopa, and not far from each other. Both were under an existing lease to one Han Same at \$160 per year, and had been further leased to this defendant, the lease to begin January 1, 1888, at \$210 per year. There was a mortgage of \$250 on the piece owned by Mahoe.

On the day when this deed was made, May 24, 1884, Namomi had been "conducted" by the witness, John Manomano, to Kaneohe, where he had the business of acknowledging a deed of conveyance of a piece of land to Abram Waiwaihole, his grandson. This being done, Namomi expressed a desire to go to the store of Ah Niu, defendant, as he wished to sell another piece of land to Ah Niu. They went there and met Ah Niu. Namomi proposed to sell him land for \$700, says this witness; for \$600 is the averment of Namomi in the bill; for \$800 is the testimony of Caroline, defendant. The price demanded, all the testimony agrees, was said by Ah Niu to be too much, and there was a long conversation. Ah Niu offered \$300, and Namomi accepted that with the agreement that Ah Niu should pay the mortgage and interest, also the expenses of the deed, and by the testimony of G. Barenaba

before the execution of the deed Namomi also demanded and Ah Niu consented to allow him \$105, which Ah Niu had paid for a half year's rent in advance of the lease, to begin in 1888.

So much is without controversy. The material question remains, what land did Namomi intend to sell, and suppose he was selling. The deed was drawn by John Barenaba, copied from a pencil draft by Pahia. They would appear to have come in during the negotiation. Barenaba testifies that the talk was about the pieces of land in Kailua, already leased to Ah Niu. After the bargain was struck at \$300, Ah Nui asked Barenaba to prepare a deed, and as Pahia had been present, gave him also a show in the business. Namomi came and sat at the table. Ah Niu produced a lease which described the land to be sold, and Barenaba copied from that the description which is only the numbers of the awards and the Royal Patents. After it was written it was read to Namomi in a loud voice, he being dull of hearing. Barenaba says he was not acquainted with the land, he wrote merely from the lease before him. There is no testimony that he was instructed to write a deed different from the intention of the grantor, or that he undertook to do so. The money, \$300, was counted out to Namomi; \$270 having been furnished by Caroline, the deed was in her name. G. Barenaba (the senior) took the acknowledgment of Namomi the same day. He heard the negotiation, and says that Namomi wished to sell the two lands which were under lease for \$700, but consented to sell for \$300, the payment of the mortgage and the cancelling (holoi) of the \$105 he had received on account of rent.

The plaintiff, Namomi, was in Court, but was not put on the stand. He is elderly. The testimony of the witnesses is that he is hard of hearing, and Mr. Castle says that he has failed mentally within the last two years.

As to Namomi, whose case I am considering separately, for all his action was separate from the other plaintiff, I can find no proof that he intended to sell only Mahoe's land, and was deceived into signing a deed for both hers and his own. He is the one who sought his purchaser, going to his store for that purpose. It appears probable that he treated all the land as united. The separate titles had been leased together, first to Han Same and after-

wards to the defendant. The price which he asked, whether \$800 or \$700 or \$600, it seems to me could have been proposed only for the whole property. It would have been an unreasonable price to expect to get for the one piece which was already under mortgage. It seems to me improbable that his anxiety was to merely be relieved of the mortgage on Mahoe's land. It is improbable that in the negotiation, which was long and heard by several witnesses, no one heard anything said implying a separation of the property already consolidated by the lease. It was the lease which was produced as the instruction for the land sold. Namomi sat at the table while the deed was being written from the lease, which he knew embraced two pieces of property.

I have said that I fail to find gross inadequacy of consideration. The evidence does not show that Namomi was incompetent to do business. The testimony of his wife is that "he is all right, except that he cannot hear well, and so blunders." If this is merely the case of an improvident bargain, equity will not relieve.

In regard to Mahoe, there is no averment that any fraudulent representations were made to her. She signed and acknowledged the next day at another place. Her principal anxiety seemed to be that the purchaser should pay the mortgage in addition to the amount paid her husband. She says she signed at the urgency of Barenaba. Any deed might be cancelled if such reasons prevailed.

Under these views the bill must be dismissed.

Honolulu, June 24, 1885.

G. WEST vs. A. B. KERR; A. A. MONTANO, GARNISHEE.

QUESTION RESERVED.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

On January 7, a garnishee paid into Court the amount he owed defendant; on February 11, ensuing, defendant was adjudged bankrupt.

Held that the fund in Court belonged to plaintiff, and not to defendant's assignees in bankruptcy; plaintiff might have withdrawn it before the bankruptcy, and the law should not put him in any worse position merely because he had not thought fit to draw his money from the registry of the Court.

OPINION OF THE COURT, BY JUDD, C. J.

Judgment was rendered in favor of the plaintiff against the defendant Kerr. A. A. Montano, garnishee, paid into Court, January 7, 1884, the sum of seventy-five dollars. On the 11th of February, 1884, Kerr was decreed a bankrupt, and his assignees, B. F. Dillingham and J. G. Spencer, now claim this sum, and the question is whether they or the plaintiff West is entitled to it.

We think that West is entitled to the fund. It was paid into Court and might have been withdrawn by West, before bankruptcy proceedings had been commenced. Undoubtedly the original suit, if it had not terminated so far as Kerr was concerned, would be suspended by the proceedings in bankruptcy. But the garnishee having paid the amount of his indebtedness to Kerr into Court, and thus discharged himself of all liability to Kerr, the fund must be treated as West's. Clearly if West had drawn the deposit, Kerr's assignees could not recover it from him. The law should not put him in any worse position merely because he had not thought fit to draw the money from the registry of the Court.

W. R. Castle, for plaintiff.

S. B. Dole, for Assignees of Kerr.

Honolulu, September 19, 1885.

SAMUEL ANDREWS vs. J. P. MENDONCA and GASPAR SYLVA.

APPEAL FROM DECISION OF McCULLY, J.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Plaintiff, in January 1880, paid defendant Sylva \$25, on account of the purchase price of certain land, and Sylva agreed to execute a deed as soon as prepared, plaintiff to pay balance of purchase money on the execution of the deed, at the rate of five dollars per acre. The boundaries and acreage of the land were not then, or at any time subsequently, ascertained, and no steps were taken to agree on the amount of the purchase money. During several years the parties had conversations about the purchase, but nothing definite was done, and meanwhile Sylva had improved the land and increased its value, and had mortgaged a part of it to raise money for improvements, believing that plaintiff had given up all intention of buying it.

In an action by plaintiff to compel specific performance of the contract to sell the land; held that the right to demand specific performance is not absolute, but rests in the sound discretion of the Court; that plaintiff should not allow his rights to lie in abeyance for so long a time; and that, on account of plaintiff's laches, the bill must be dismissed.

Decree of the Vice-Chancellor affirmed.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an appeal by the plaintiff from a decision of the Vice-Chancellor, dismissing the plaintiff's bill, claiming specific performance of an agreement for the sale of land in the district of Waialua, island of Oahu.

The agreement is alleged to have been entered into in the month of November, 1880, but from the evidence of Mendonca it appears to have been made in January of that year.

The Vice-Chancellor dismissed the bill on the ground, principally, of laches on the part of the plaintiff in prosecuting his claim.

At the hearing before us an affidavit by Mr. W. R. Castle was filed, explaining and contradicting his testimony given on the original hearing, on which occasion he denied having received any money from the plaintiff on account of the purchase money for the land in question, and said that he had no recollection of Sylva coming to his office about the land.

By the affidavit the witness states that from an examination of his books he finds that the plaintiff, on the third of February, 1882, paid to the deponent \$200 to pay "cash down" on the purchase of said land, and that deponent then agreed to advance the remainder necessary to complete the purchase price, and that, at a time subsequent to said third day of February, 1882, and prior to the commencement of the suit, in the year 1882 or 1883, said Sylva came to the office of deponent, and deponent then requested him to execute a deed to said Andrews of the premises in question, and offered to pay him the purchase price thereof, and that said Sylva replied that he would do so, but that he was coming to town in a few weeks with his wife, and then they would attend to it.

The defendant denies these statements.

But taking the statements to be correct, do they make the case any better for the plaintiff? Was anything subsequently done by the plaintiff before the defendant made the improvements to the land, showing an intention by the plaintiff to exercise his right of purchase?

On looking at the agreement, we find it stated the land in question contains ninety-five acres more or less, without further description, except that it is situated at Kawaihapai, in district of Waialua, and the price five dollars per acre.

This agreement was acknowledged by Mendonca before Mr. Castle, on the 16th day of June, 1882, and it appears to the Court that these words were then added, "land known as the Rice land, sold by Rice to Gulick." Underneath is written, seemingly as a memorandum of instructions, "Thinks there are two pieces."

In a conveyance from Gulick to Mendonca, which is put in evidence, there is a reference to a piece of land containing 45 acres, said to have been patented to W. H. Rice by Grant 458, also to another piece, containing 42 acres, part of land described in Grant

353, to Nahoā, part of the land (3 acres) having been sold to other persons.

Now, it does not appear that any steps were taken to ascertain the boundaries or acreage of the land, nor to agree on or ascertain the amount of the purchase money.

The matter was allowed to remain, and the statement of Mr. Castle to Sylva could only amount to this: "Andrews has instructed me to prepare a deed for him, will you sign it when ready?" and nothing further was done; in fact, it would appear to have been forgotten altogether by the plaintiff's then attorney.

Upon a consideration of the whole case, we are of the opinion that the decision of the Vice-Chancellor was correct, and accordingly the decision appealed from is affirmed with costs.

A decree will be signed on presentation.

L. A. Thurston, for plaintiff.

A. S. Hartwell, for defendant, Sylva.

Honolulu, September 19, 1885.

DECISION OF McCULLY, J., APPEALED FROM.

This bill is brought to enforce the specific performance of the following agreement:

"Received from Samuel Andrews the sum of twenty-five dollars, on account of purchase money of a certain piece of land, situated at Kawaihapai, district of Waialua, Island of Oahu, containing ninety-five acres, more or less, and I agree to execute the necessary deeds of conveyance as soon as prepared, the (said) Samuel Andrews to pay the balance of purchase money (at the rate of five dollars per acre) on the execution of said deeds, land known as the Rice land, sold by Rice to Gulick.

J. P. MENDONCA.

Witness,

RICH'D F. BICKERTON."

This instrument is not dated.

It appears by the bill and answers that the two defendants were in a partnership in carrying on a ranch, which was dissolved November 30, 1880, at which time the defendant Mendonca made a conveyance of certain lands to the defendant Sylva, including the parcel referred to in the agreement in question, which lands he

had purchased of C. T. Gulick, by deed dated December 8, 1879. The date of the instrument is thus fixed between these two dates.

An instrument is exhibited, dated January 8, 1881, by which Gaspar Sylva covenants with the other defendant, Mendonca, to keep harmless and indemnify him from all claims which may arise out of the agreement to sell to Andrews.

The bill alleges repeated demands on Mendonca to specifically perform the contract; that before the sale of the land to Sylva, he had notice of this agreement, and that since the sale the plaintiff has frequently requested Sylva to receive the balance of the purchase money and to execute a deed. The specific averment in this particular being that the plaintiff had deposited the money for the purchase with his attorney in Honolulu, W. R. Castle, Esq., and had requested Sylva, and Sylva had agreed, to go to Mr. Castle's office, sign a deed and receive his money, but had neglected and refused to do so.

The answer of Sylva admits that he was informed by Mendonca, at the time of the sale of the land, of the agreement with Andrews, and that he made the covenant to keep him harmless. He denies the requests of plaintiff that he would receive the money and make the conveyance, and avers that the plaintiff at first informed him that Mr. Castle would advance the money, but subsequently that he declined, and that plaintiff could not raise the money, and he avers that he was ready and willing to carry out the agreement, until, believing that plaintiff had given up all intention of buying the land, he had fenced and improved it, and enhanced the value of it, and had included it in a mortgage by which money was raised for these and other improvements, etc.

The answer of defendant, Mendonca, admits the agreement, which he says was made about January, 1880, at the request of Andrews, after conferring with his partner. Admits the plaintiff's requests to him to convey as per agreement, but says that he requested him to wait until law suits pending between himself and partner should be settled. And that subsequent requests he referred to Sylva.

I have not made full abstracts of the bill and answers, leaving the incidents of the case to appear by a resume of the testimony applicable to the principal points involved.

Andrews, plaintiff, testifies that when the litigation arose between the defendants, this business was deferred at their request till the division of the property should be made. By the record in the case of *Mendonca vs. Sylva*, it appears that the litigation commenced in January, 1880, and closed in October. Andrews testifies that two weeks after the close of the litigation he met Sylva, who referred to the subject of the sale, and asked what he could do for him, and that it was left for Sylva, whenever he should next go into town, to go to the law office of W. R. Castle, where the deed might be executed and he would receive the money. By Andrews' testimony, nothing more was said about the business until the early part of 1882, when he met Sylva driving in a brake with his wife, when Sylva appears to have opened the conversation by asking, "What about that land we sold you—do you still wish it?" To which Andrews answered, "Certainly I do." That Sylva asked if he would not take instead an adjoining piece, and that Andrews said "No," giving reasons why he preferred the first piece, and that Sylva said, as he insisted on having the land, he would be going to town in a week or so, and would go to Mr. Castle's office, where Andrews said the money had been ready for him for some time, and make the deed. That the men next met January, 1883, at the house of Squires, in Honolulu, when Sylva asked Andrews to give up the bargain—Andrews made no answer.

Sylva's testimony recognizes some interviews with Andrews. He makes out that Andrews was not at any time prepared to pay for the land, that he—Sylva—was quite desirous of realizing the money and was only waiting till Andrews could pay him.

Mr. Castle's testimony is to the effect of Andrews having placed the agreement in his custody, and asked him to advance the money. This Castle was willing to do. There was nothing moved actively forward by Andrews. Mr. Castle did not speak to Sylva's agent, Mr. S. M. Damon, whom he might see daily. At a late period, and when he heard that Sylva was proceeding to improve the premises, he spoke to Mr. Damon, who thought the matter had gone so long that Andrews had lost his right.

Squires gives testimony to show that both parties talked with him about the sale. Sylva requesting him to speak to Andrews,

and he telling Sylva that Andrews depended on Castle for the money, and there seemed a difficulty about getting it. Squires says that Andrews used to make loans of him; one application, he had an idea, was for the purchase of this property.

The testimony of Mr. Damon is that, by improvements on the land and in the neighborhood, the land has risen in value. It was safely worth now \$1,200.

There is no precise rule for the determination of cases where specific performance of contracts to sell land is asked. The case of a defendant is better than that of a plaintiff, that is, it requires a much less strength of case on the part of a defendant to resist a bill than on the part of a plaintiff to enforce it. The right is not absolute, but in the sound discretion of the Court. Story's Eq. Jur., Section 742 and Section 769.

The impression made upon my mind by all the testimony, of which but a small part is quoted above, is that the plaintiff has committed laches which should bar his rights. He seems to have left everything for Sylva to do. At long intervals he meets him and asks him to go to his attorney in town and do the business. He had no money on deposit then, and I think Sylva was justified in his doubt if he should get it. The contract calls for payment of the balance at the rate of five dollars per acre, but there is no evidence that the exact area had been determined and that Mr. Castle had in his hands the data for drawing the deed and ascertaining the precise sum due on the land. When the parties met in town at Squires' house, and the business might have been closed by a tender of the money and a deed, nothing seems to have been done. The conduct of Andrews was not that of one who is ready and desirous to carry out the contract. It does not seem to me to be equitable that the land should for so long a time be bound by a contract of sale, which might have been completed promptly after it was made. Several years pass by—the land more than doubles in value—the owner raises money for improvements, in part by a mortgage of this piece. It seems to me to be a sound and wholesome rule to say that a person in the plaintiff's position should not allow his rights to lie in abeyance for such a length of time. He stands ready to play fast and loose. If the

land shall rise in value, he will claim it. If it falls, he will let it alone. He is not bound to purchase.

The plaintiff's bill is dismissed.

Honolulu, June 20, 1885.

SING CHONG & CO. vs. HUTCHINSON PLANTATION COMPANY.

APPEAL FROM DECISION OF THE CHANCELLOR.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

The Hutchinson Plantation Company gave Akai 250 acres of land, rent free, and advanced him money to plant it with sugar cane; the cane was to be ground at the company's mill, and Akai was to receive half the proceeds, less the advances made by the company, and interest thereon. Akai mortgaged the sugar produced, or to be produced, from this land to Sing Chong & Co., who bring suit against the Hutchinson Plantation Company to foreclose the mortgage, claiming that the company hold the proceeds of the sugar and refuse to account. The company claim that there is no money due to Akai, but that he is in their debt on account of said sugar.

Held, that Akai had no property in the proceeds of the sugar until the advances made by defendant were paid, and as the accounts show there is nothing coming to him, plaintiffs can take nothing under their mortgage, as all the mortgagor could assign was his prospective balance of account.

As to certain cattle included in the mortgage, held that if plaintiffs desired foreclosure as to these, they should have made the assignees in bankruptcy of Akai parties defendant.

Decision of the Chancellor affirmed.

DECISION OF THE CHANCELLOR, APPEALED FROM.

THIS is a bill to foreclose a mortgage dated the 7th of September, 1883, made by one C. T. Akai to plaintiffs, upon which the whole amount, \$10,000, is due.

The bill alleges that A. Hutchinson, on the 16th of July, 1877, made an agreement to lease, and did lease, to Akai some 250 acres of cane land at Honuapo, Kau, Hawaii, to be planted in sugar cane by the said Akai for grinding at Hutchinson's mill, upon an equal division of the net proceeds of the sugar therefrom, which land was accordingly cultivated in sugar cane, which was ground from time to time at the said mill; that Mr. Hutchinson died in 1879, and the defendant corporation, the assignee and present owner of the said mill, adopted and carried out the agreement for grinding the cane, and has come into possession of and retained the proceeds of said sugars and refuses to account. Akai was adjudged a bankrupt March 28, 1884, and his assignees are J. Hyman and S. Selig. The mortgage covers, besides some cattle, etc., "all sugar cane growing or hereafter to grow upon lands in said Honuapo, Kau, and all sugar produced or manufactured from said sugar cane, and all leases of land situate in Kau, held by Akai, etc." The bill prays that the defendant corporation account for and pay over to plaintiffs the net proceeds of said sugar.

The answer of defendant avers that it has received certain sugar cane from C. T. Akai, and ground the same at its mill in conformity with the contract above referred to, and has in pursuance of the contract advanced, paid and laid out on behalf of said Akai certain moneys, and has accounted to him for all sugars received, and that there is now due from him to defendants \$16,394 12; that defendant has not, nor had at the commencement of this suit, any money, sugar or chattels of said Akai.

By the contract, Hutchinson places 250 acres of his land in Akai's hands, rent free, he to plant and cultivate it with cane. Hutchinson agrees to erect a mill of a certain capacity, to advance to Akai "not to exceed \$40 for each and every acre of sugar cane planted and cultivated as before mentioned, the same to be paid from time to time, as required, and to manufacture into sugar all cane produced, as aforesaid" by Akai, and "to receive as compensation one-half of the net proceeds of all sugar manufactured by him from the aforesaid sugar cane." * * * "And that during the term of this agreement the party of the first part shall dispose of all the shares of sugar belonging to the parties of the said part through his agent or agents, and from the proceeds thereof

shall deduct the advances, together with interest on the same at the rate of 12 per cent. per annum, made by him to the parties of the second part, and shall well and truly pay over to the parties of the second part all or any balance there may be from time to time in their favor, etc." The agreement is dated 16th July, 1877, and was to continue for the term of six years from its date, with the privilege of renewal for four years. The agreement continued in force until 1884, when Akai was made bankrupt.

The questions, as stated by plaintiffs, are: first, whether the agreement is equivalent to a mortgage to any extent against the plaintiffs, who are Akai's mortgagees; second, if to any extent, what? And it is contended that a decree should be made requiring the defendants to pay to them all moneys received from sale of the Akai sugar, deducting only a sum equivalent to \$40 an acre for six years, with interest.

It is claimed for the defendant that by the agreement the crops of cane and sugar manufactured belong absolutely to the defendant, and the mortgagor has no right of property except in any balance which may from time to time result from the sale of sugar. This prospective balance is all that the mortgagor is interested in and could assign by way of mortgage.

I think the defendant's contention is correct. The agreement is not one of partnership. It is one by which the cane-planter agrees to receive as compensation for his services in planting and cultivating the cane to maturity one-half of the net results of the sugar manufactured, after all the sums advanced by the mill-owner have been deducted, with interest. It bears a close similarity to a mortgage by a partner of his partnership interest, which has been held by this Court to cover only the residuum or surplus after partnership debts are paid. *Makee vs. Dominis*, 3 Hawn., 579. But the case before us is stronger, for here the mill-owner contributes the land and the money for working the land, and manufactures the cane into sugar, and the planter contributes nothing but his skill and supervision. It is not necessary to hold that a lien exists upon the cane and sugar in favor of the mill-owner for his advances, for by the contract the cane-planter is to have no property in the sugar cane or sugar produced, nor in their

proceeds, unless there remain something of the moiety after the advances are paid.

From the accounts presented there was nothing *in esse* at the date of the mortgage (except the cattle, etc.) in which Akai had an interest which he could assign. I presume the mortgage, however, should be held to be an assignment of his interest in the net results of the agreement. The subsequent accounts show that there is nothing coming to Akai. His mortgagee, therefore, can have nothing from defendant by virtue of the mortgage. The defendant agreed to advance not to exceed \$40 an acre. It has advanced considerably more, presumably at the instance of the mortgagor. It does not lie either in his or his mortgagee's mouth (who are affected by notice of the recorded agreement) to say that the amount in excess of the \$40 dollars per acre, which created the property, shall not be repaid. This was the contract. As I have said, Akai's compensation was agreed by him to be the possibility of a profit from the enterprise and nothing more.

The bill is dismissed.

If the plaintiffs desired foreclosure of the mortgage upon the other property—*i. e.*, the cattle, etc.—they should have made the assignees in bankruptcy of Akai parties defendant.

Honolulu, July 3, 1885.

OPINION OF THE FULL COURT, BY PRESTON, J.

This is an appeal from the decision of the Chancellor, dismissing the plaintiff's bill for foreclosure of a mortgage from C. Akai & Co. to the plaintiffs.

Upon reading the pleadings herein and the evidence taken at the hearing, and also the various exhibits filed, we are of opinion that, for many reasons besides those stated by the Chancellor, the bill should be dismissed.

The decision of the Chancellor is therefore affirmed, and the bill stands dismissed with costs of this appeal.

A. S. Hartwell and *C. Brown*, for plaintiffs.

F. M. Hatch (*P. Neumann* with him), for defendants.

Honolulu, September 21, 1885.

HAWAIIAN BELL TELEPHONE CO. vs. MUTUAL TELEPHONE CO.

EXCEPTIONS TO RULINGS OF McCULLY, J.

JULY TERM, 1885.

JUDD, C. J., and McCULLY, J. PRESTON, J., having been of counsel, did not sit.

Chapter 45, Laws of 1874, allowing any company incorporated "for the transmission of intelligence by electricity" to construct lines along the public roads, held to be broad enough to cover the erection of poles and suspension of wires by a telephone company.

The Privy Council, in granting plaintiffs' charter, construed the Act of 1874 as applying to telephone companies: held that such construction, though not binding on this Court, is entitled to great weight, as being the contemporaneous interpretation of the law by a department of the Executive.

As the law authorizes the Minister of Interior to allow the construction of lines, it is not essential that the company obtain the Minister's permission in the form of a written contract.

A second telephone company is bound to construct its wires so as not to interfere with the wires of a company already established, and it is no defense to an action for damage caused by interference of wires that ordinary care and skill was used in constructing the line of the second company.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

This is an action in case tried at the July Term, 1885, of this Court. The jury rendered a verdict for plaintiff, and the defendant's exceptions, arising at the trial, were submitted on briefs by consent in vacation.

Both plaintiff and defendant are incorporated telephone companies, having lines throughout the town of Honolulu.

The plaintiff alleges that the defendant, during twelve months past, has erected poles and wires in Honolulu for the purpose of its business, but so negligently, carelessly and unskillfully, that

they have come in contact with the plaintiff's wires, and have interrupted the circuits of plaintiff's wires, and have destroyed their insulation, and have interfered with plaintiff's wires, etc., and defendant has wilfully, maliciously and repeatedly, especially during six months last past, refused to remove its wires from contact with the plaintiff's wires, and has allowed its wires to remain in contact with the plaintiff's wires for a long and unreasonable time, etc., for which damages are claimed.

Following is the bill of exceptions :

" At the close of the plaintiff's case, and again after the case on both sides was closed, the defendant moved the Court to instruct the jury to find a verdict for the defendant, on the ground that the plaintiff had shown no power conferred upon it by law for the construction of its telephone poles and wires, and other fixtures, in the streets of Honolulu and vicinity, as alleged in its declaration, which several motions were denied, and exception to such denial was duly taken and allowed.

" The plaintiff's charter, filed herein, was the only evidence on which the plaintiff based its claim that such power had been conferred upon it.

" The Court instructed the jury :

" That the plaintiff company was not bound to build its lines especially with reference to the establishment of new lines by companies which might afterwards come into existence, provided the plaintiff company had built its lines in a reasonable manner, as for instance not unnecessarily taking both sides of the road, and not unnecessarily making its lines so low and so high that they could not be crossed.

" That the defendant company was bound to construct its lines in such manner as not to lie in contact with plaintiff's wires, or to be an interference with the operation of plaintiff's instruments, provided that if such interference and obstruction be accidental, temporary, and not the result of unskillfulness and negligence, the plaintiff company may recover only actual damages, provided also that the plaintiff company must not have contributed by any want of ordinary skill and care on their part.

" That the plaintiff company would be entitled to have no in-

terruption by the defendant company in the operation of its lines.

"The defendant duly excepted to the said several instructions, and such exception was duly allowed.

"The defendant asked the Court to instruct the jury that the defendant was not liable for any damages which ordinary care and skill on its part could not have foreseen and prevented, which instruction the Court refused to give, and the defendant duly excepted to such refusal, and such exception was duly allowed.

"The Court instructed the jury that it was not actionable for the defendant to deprive or take away subscribers from the plaintiff by competition.

"There was no evidence tending to show any malice on the part of the defendant in respect of the acts complained of by the plaintiff.

"The evidence on both sides was that the defendant used the best material in the construction of its lines, and there was evidence on the part of the defendant that some of the interruption of the plaintiff's wires and instruments were caused by the breaking of a screw, in one instance, of an insulating knob in another instance, and by the blowing down of an algeroba tree in another instance.

"The defendant's witnesses testified that the utmost care had been taken on the part of the defendant to prevent its wires from interfering with the plaintiff's wires.

"Plaintiff's evidence tended to show that, during a large part (or most) of the six months preceding the date of the complaint, plaintiff had been interrupted in its business by defendant's wires being in contact with plaintiff's wires; that Cassidy, plaintiff's Superintendent, had spent a large portion (about half) of his time in endeavoring to discover the places of contact and in remedying the same; that he had employed an extra helper at \$50 per month on account of the same; that said interruptions were caused in part by faults in construction of defendant's wires; that said interruptions had diminished since suit was brought.

"A. Jaeger, Secretary and Treasurer of defendant company, testified that his instructions to Superintendent Pratt were to avoid, even at any expense, any contact with the wires of the

Hawaiian Bell Telephone Company; and H. A. Widemann, President of defendant company, testified to the same effect.

"Pratt, Superintendent of defendant company, testified that he received and carried out these instructions to the best of his ability, and that the construction of the lines was patterned after that of a telephone company of San Francisco, excepting that the San Francisco system of wires went over buildings; also that he did his best in making the lines so as to avoid contact with plaintiff's lines.

"But he admitted, on cross-examination, that if defendant's poles were higher at places of crossing plaintiff's wires or nearer together, danger of contact from sagging of the wires would be avoided.

BY THE COURT.

The first point made by defendant is that the plaintiff has no legal right to establish telephone lines in Honolulu.

The plaintiff's charter specially vests the corporation with all the powers, privileges, rights and immunities mentioned in Chapter 45 of the Session Laws of 1874, entitled: "An Act for the encouragement and aid of any company now incorporated or that may be hereafter incorporated for the transmission of intelligence by electricity." Section 1 of the Act reads: "The Minister of the Interior is hereby authorized and empowered to permit and allow any company now incorporated in any foreign country, or that may be hereafter incorporated in this Kingdom or any foreign country for the transmission of intelligence by electricity, to construct lines of telegraph upon and along the highways and public roads, etc."

We think the Act broad enough to cover the telephone companies. By this invention intelligence is transmitted by electricity. Wires hung upon poles erected at intervals along the streets are at present deemed necessary in the system of telegraph as well as of telephone lines. So far as use of the public streets is concerned the obstruction is the same, except that telephone companies require more wires. By means of a telegraph the electricity records marks visible to the eye, which are read, and thus intelligence is transmitted over the entire length of the wire. In a telephone electricity enables the sound of the human voice to be transmitted

along the wire. It is not essential to know whether telephones were invented and in use when the Act of 1874 was enacted, though we believe they were. The law-makers wisely made the Act broad enough to cover improvements and discoveries to be made by the researches of scientific men. If the company transmits intelligence by means of electricity, the law allows the erection of poles and the suspension of wires along the streets and roads of this Kingdom.

The Privy Council, in granting plaintiff's charter, construed the Act of 1874 as applying to telephone companies. But this Court, though not bound to follow without reason the construction placed by the Privy Council upon an Act of the Legislature in cases where the true construction is doubtful, such construction by the Privy Council is entitled to great weight. In the Supreme Court of the United States the contemporaneous and uniform interpretation of an Act of Congress by an executive department is entitled to weight, and in a case of doubt ought to turn the scale. See *Brown vs. United States*, 113 U. S., 571 (1884.) Numerous decisions of that Court are to the same effect. In *Edwards vs. Darby*, 12 Wheaton, 210, it was said: "In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great respect," and the Court refuses to interfere with such construction after it had been acted upon for a long time.

See also *Atkins vs. Disintegrating Company*, 18 Wall, 272; *Smythe vs. Fisk*, 23 Wall, 374, 382; *United States vs. Pugh*, 99 U. S., 265; *United States vs. Moore*, 95 U. S., 760, 763.

We feel fully justified in holding that plaintiff's charter authorized it to claim the privileges granted by the Act of 1874.

2. The Act authorizes and empowers the Minister to "permit and allow such company to construct its lines upon and along the highways and public roads." That he has so permitted and allowed these erections is evidenced by the fact that they have been erected. It is not essential that the plaintiff should obtain the Minister's permission in the form of a written contract. Without a law authorizing the same the planting of telephone poles along

the streets would be an obstruction which the Minister of Interior, in whose charge the streets are, would be obliged to object to.

3. The charge of the Court, that the defendant company was bound to construct its lines in such a manner as not to lie in contact with the plaintiff's wires or to be interfering with the operation of the plaintiff's instruments, is especially objected to by defendant's counsel.

We think the Court was right. This charge followed logically from the earlier part of the charge that "though the privileges granted to the plaintiff company were not exclusive, yet it was bound in the construction of its lines to make a reasonable use of its privileges, not taking an unnecessary amount of space along the roads and streets, but was not bound to build specially with reference to the lines of one or more companies which might come into existence thereafter." "The plaintiff company has now a right to the place and ground it has thus reasonably taken."

We think this instruction was correct. The advantage which the first occupier of the street has for purpose of erecting poles is certainly considerable. It has the choice of position, and what has been granted to it and what it has taken and occupies under its franchise cannot legally be granted to a subsequent company. A subsequently formed corporation takes its charter with this knowledge and must erect its lines with reference to the occupancy of the company holding the previous franchise, and takes the space that is left unoccupied. If this were not the law a third or fourth corporation might claim that it could run its lines intersecting or interlacing those of all previous companies, and thus practically destroy their franchises. For a new company to suspend wires over a former established system of wires, so that by the expansion caused by heat they should sag and thus come in contact with the lower wires, and remain so; would be trespass upon the rights of the former company. If this was done willfully and maliciously, exemplary damages could be claimed. If, as charged by the Court, the contact was not malicious and willful, but accidental and temporary, and no contributory neglect on the part of plaintiff is shown, actual damages suffered could be recovered.

This, we understand, was the proved case on which the jury

JULY, 1885.

awarded the damages. As stated in the complaint, "defendant refused to remove its wires from contact with plaintiff's wires for a long and unreasonable time."

This instruction asked for by defendant as defining its liability—to wit, "that defendant was not liable for any damage which ordinary care and skill on its part could not have foreseen and prevented"—does not express its entire liability, for if, even in the construction of its own lines, ordinary care and skill was used, and yet its lines should lie in contact and interrupt the communication over plaintiff's lines, this would be a trespass.

The exceptions are overruled.

F. M. Hatch, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, September 22, 1885.

KUKUINUI (w) and KAUKA, her husband, *vs.* NAIHE (k)
and LIKIA (w.)

APPEAL FROM DECISION OF THE CHANCELLOR.

JULY TERM, 1885.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

Plaintiffs, old and feeble Hawaiians, desired to make a will in favor of their grandson, Naihe, but were induced to make a deed instead. It was understood between the parties that plaintiffs were to live on the land and be supported by Naihe during their lives, but this was not put in the deed. Naihe afterwards made a deed of the property to Likia, his mistress.

Held, affirming the decision of the Chancellor, that the intention of plaintiffs was to reserve a life interest and to charge Naihe with their support; that they executed the deed to Naihe under mistake of its legal effect, and that it did not express their true intention; and that knowledge of sufficient facts to put her on enquiry was brought home to Likia.

Ordered that both deeds be cancelled.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an appeal by the defendant, Likia, from a decree of the Chancellor, whereby he adjudged and ordered two deeds, the subject of this suit, to be cancelled and annulled.

Upon considering the evidence recorded in this case, the Court is of opinion that the construction placed upon the evidence by the Chancellor is correct; and that, at the time of the execution by the plaintiffs of the voluntary deed of the 26th day of January, 1880, the plaintiffs did not fully understand the nature and full effect of the deed, and consequently the decree of the Chancellor must be affirmed.

The case is clearly within the ruling of the English Court of Appeal in *Dutton vs. Thompson*, 49 Law Times R. N. S. 109.

The appeal is therefore dismissed with costs.

M. Thompson, for plaintiff.

A. Rosa, for defendant, Naihe.

Kinney & Peterson, for defendant, Likia.

Honolulu, September 25, 1885.

DECISION OF THE CHANCELLOR, APPEALED FROM.

I find the following undisputed facts in the case:

Kukuinui, a very aged Hawaiian woman, living with her husband, Kauka, also quite aged, upon her own land,—where they had been for thirty years—a small house-lot on Smith street, Honolulu, and being precariously supported by the charity of her grandson, Naihe, and other friends, desired, as she was old and feeble, to make some disposition of her property. Mr. C. K. Kakani, a Hawaiian lawyer, who was visiting near by, was called in. This was in 1880. These old people said they desired a will to be made in favor of their grandson, Naihe, a young man now aged about 23. Kakani advised them that a will would involve expense and provoke litigation, and advised a deed. To this they consented, and a deed was drawn, which they signed and acknowledged, and which was duly recorded. It conveys the land to Naihe absolutely “in consideration of the sum of one dollar, paid to us by Naihe, our grandson.” These old people had no other property. The land in question is variously estimated as

worth \$800 and \$3,000. They continued to live on the premises without disturbance, and live there now. Naihe was a sailor in the coasting trade. He became ill and went to the hospital for treatment. A few years after receiving this deed, he consorted with a woman named Likia, and they lived together on the premises in question, in a house which she and a former paramour of hers, Kimo (a band boy), had built thereon, under a lease from Naihe. Likia took care of Naihe during his illness, and occasionally visited him while at the hospital. In July, 1884, Mr. J. W. Kalua, a Hawaiian lawyer, was sent for to make a deed from Naihe to Likia. On his reaching the house where they were, Mr. Kalua asked what the consideration of the intended deed was to be, and Naihe said, "one dollar." On Mr. Kalua's reminding them that this was not an ordinary price for land like this, Naihe said, "I had an illness some time ago, and I was very nearly dead, and it was this woman that cared for me, and I now think you better put into the deed \$100, and the land shall be the price or pay to her for her care of me." He says further, "I asked the reason for making the deed, and he gave it, *i. e.*, that she had cared for him in his illness, provided him with food, etc. This was the reason he gave. No money passed at the time. I saw none. No conversation about the passing of money before or after the drawing of the deed, that I heard." Both Kukuinui and Kauka say they told Naihe that they wished him to support them during the remainder of their lives, and that he consented to it. Also that they were to remain on the land so long as they lived. But that these provisions were not put in the deed, and that they knew this when the deed was read. Naihe, whose answer admits the allegations in the bill, testifies to the same effect. But Kaka-in, and others who were present when the deed was executed, say that nothing was said by any one, either that Naihe was to support them, or that a life estate was to be reserved to the grantors.

I cannot resist the impression that these grantors, feeble in body and mind, through great age and scant food, ignorant of the effect of legal instruments, relied upon the oral promise of Naihe to support them, and so made no protest when the deed was read to them. If they had been told that the effect of the deed was to pass to their grantee the right of immediate possession of the

land, and that he had not bound himself to support them, they would not have signed it. Their deed was a voluntary settlement or conveyance. It was drawn by an ignorant man, who presumed to advise these people, almost in *senile dementia*, to consent to what was never in their minds, if, indeed, they were capable of any intention further than that after their death they wished their grandson to have their property. Naihe knew this was the fact when he took the deed. These old people remained on the land, and were furnished by Naihe with food or money, as before, whenever he had money or food. If it were not for the deed to Likia, probably, they would have continued in this way, until death released them, and the Court would not have heard from them.

But Naihe has parted with his title to Likia. She has produced witnesses whose credibility is not attacked, who swear that she received \$100 from her father, Opiopio, a respectable cane planter at Waimanalo, and paid it to Naihe as the consideration of the deed. The only way which this apparently credible testimony can be reconciled with Mr. Kalua's statements as to what was actually agreed upon between them as to the consideration for the conveyance, is that Likia, seeing that the deed recited the consideration of \$100, thought she had better pay it to secure her title, and Naihe took the money. But does this place her in the attitude of a *bona fide* purchaser? I think not. She was present at the time the deed of the old people was made to Naihe. During the time between this deed and the conveyance to herself, she was living with Naihe as his mistress, and it is not a violent assumption to say that she must have known the circumstances under which the prior deed was executed. At any rate, she knew, for she admits it, that when she took her conveyance, the old people were still living on the land, and were old, feeble and poor, and she says she has no intention of dispossessing them, and that Naihe told her that if he sold the land to her, she was not to drive the old people off. I consider that the conveyance from Naihe was also a voluntary settlement, a gift to the woman for whom he had an affection.

This Court held, in *Afong vs. Afong*, ante, p. 191, adopting the summary of the law from Bispham, page 67, "That where

the intent to make an irrevocable gift is perfectly apparent, or when even in the absence of such a clear intent, a sufficient motive (such as protection against the grantor's own extravagance and the like) for making such a gift exists, the settlement cannot be disturbed. But where the deliberate intent does not appear, and no motive exists, the absence of a power of revocation is *prima facie* evidence of mistake."

In the case before me, I feel satisfied that the intention was to reserve a life interest to the grantors, and to charge the grantee with the support of the grantors. The same result would have been effected by a will, as was originally desired, which would be inoperative until the death of Kukuinui, and so far as the obligation to support was concerned, a failure to do this might induce a revocation of the will.

I think enough has been shown to make it certain that these aged people executed the deed to Naihe under mistake of its legal effect, and that it did not express their true intention. Knowledge of this, or of sufficient facts to put her upon inquiry, is brought home to Likia, and the gift to her is similarly affected.

The question as to the exact relief which should be afforded to these plaintiffs is one of some difficulty.

The plaintiffs, by reason of their mental and bodily infirmities, are likely to be easy subjects of further imposition. They will have to depend, as for many years past, on the charity of friends and neighbors for food.

The bill prays that the deed from Naihe to Likia may be declared void and cancelled, and that Naihe, in order to carry out the original agreement, may be ordered to give bond with surety to pay ten dollars per month for the support of the plaintiffs, so long as they live, and in default of this being done by him that the deed be declared void.

I am averse to thus favoring Naihe, who was willing, by his deed to Likia, to perpetrate a gross wrong upon his confiding grandparents. This Court cannot undertake to leave it optional with him to support the old people, or have his deed cancelled.

I think both deeds should be cancelled, and will sign a decree to this effect.

Honolulu, June 25, 1885.

THE KING *vs.* HIRAM A. BRIDGES.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

JULY TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

When a person takes the life of another under the plea of self-defense it is for him to show the actual necessity for the act: that the person killed was in the act of committing some felony, or in the act of committing some grievous bodily harm upon the slayer under such circumstances as would induce a reasonable belief, from the manner of the assault and the weapon used, that the danger was imminent, and nothing short of taking the life of the aggressor would prevent it. No threats, no provocation by insulting language, gestures, or acts, unless accompanied by all the circumstances before mentioned, will justify or excuse the taking of human life.

It is proper to leave the whole case to the jury, with a statement of the law applicable.

A verdict of manslaughter in the second degree held fully justified by the evidence.

OPINION OF THE COURT, BY PRESTON, J.

THE defendant, Hiram A. Bridges, was indicted at the last January term of this Court for manslaughter in the first degree, by feloniously killing one Leonard R. Patten, on the 12th day of November, 1881, and was convicted of manslaughter in the second degree. The Chief Justice presided at the trial.

It appears from the evidence that at about 5 o'clock p. m. on the day in question the defendant was walking along Fort street, in this city, when Patten (the deceased) left some persons with whom he was talking outside Waterhouse's store and went into the store, from which he returned carrying a stick in his hand (described by witnesses to be about three feet long) and crossed over to the opposite side of the street and attacked the defendant, striking him several times about the head with the stick. The stick, which was of the kind used as a roller for piece goods, was broken by the force of the blows. The defendant, who had a loaded revolver

concealed about him, drew it and fired twice at the deceased, the second shot inflicting a mortal wound. The deceased was carried into a druggist's store near by and expired within a few minutes.

Evidence was given of improper relations having existed for some time between the deceased and the defendant's wife previous to her marriage with the defendant, which took place in the July preceding; and that the deceased had on several occasions been heard to say that he would shoot the defendant's wife, and that they (the defendant and his wife) should not leave the beach alive. These threats were not made in the hearing or presence of the defendant, but were communicated to him previous to the shooting.

The defendant testified: "The first threat was to the effect that we should not leave the beach alive. My wife told me this; she also told me that Mrs. Horn (her mother) had told her that Patten had said he did not care for his life, but neither one of us should leave the country alive. These are the threats he made against me. These threats were brought home to me before the 12th November. From what I heard of these threats I thought that Patten would shoot me on the first opportunity. On Monday, the 10th, I was induced to carry my pistol in my pocket, believing he would kill me." Speaking of what occurred on the 12th, the defendant says: "When I heard the 5 o'clock whistle blow I walked up Fort street, on Ehler's side, toward home. When opposite to Williams' store, without any warning, I received a blow on the left side of the face and heard the words (an opprobrious epithet) 'I have got you now'; at the same instant I received another blow just below the temple. In a dazed condition I started to run, when some one came up behind me and caught hold of my shoulder. I turned around and recognized Patten, his face white and his teeth showing. I felt for my weapon, and while drawing it he struck me again, saying 'Oh, you may shoot,' at the same time raising the stick; while it was descending I pulled the trigger. In my excitement I may have pulled it twice. I felt him leave go of me and I ran up Fort street."

There is a slight discrepancy in the evidence of the various witnesses who saw the shooting—J. F. Noble, J. Williams, W. M. Gibson, F. H. Hayselden, H. Armitage, E. W. Jordan, J. M.

Starkey, J. S. Ginsburgh and W. Evans—as to the position of the parties at the time the shots were fired, and as to whether the first shot was fired before a blow was struck by the deceased, but the great preponderance of the evidence would seem to show that several blows were struck before the first shot was fired, and that when the second shot was fired the parties had separated a very little way and the stick was broken.

Counsel for the defendant requested the presiding judge to instruct the jury :

1st. That if the defendant heard and believed that Patten made threats against his life, or of severe bodily harm, he was justified in defending himself against the execution of such threats.

2d. That if the jury believe from the evidence that if Patten did make threats of severe bodily harm or of death against Bridges, that Bridges had reasonable ground to believe, and did believe, that such threats had been made, he was justified in using extreme measures for his self-defense, provided an attack was made on him by Patten.

3d. That if the jury believed from the evidence that at the time of the slaying some act was being done by Patten from which the defendant might reasonably infer that said Patten was about to carry out his previous threats made against defendant's life or person, he was justified in killing him, and the defendant must be acquitted.

4th. If the jury believe from the evidence that the killing of Patten was not excusable, and find that the defendant at the time was in a peculiarly nervous and excitable condition, they may return a verdict for a lower degree than that charged."

Which instructions were refused, but the instruction No. 3 was given, modified by the Court adding thereto the words: "But it must have been shown that Patten attacked him with a lethal weapon."

The defendant by his counsel excepted to said refusal to charge, and to said charge as modified.

The Court, in its charge to the jury, said :

"If you find that there is evidence to show that this homicide was premeditated by Bridges you cannot help finding him guilty as charged.

"A man must retreat, as far as he can safely, to avoid his assailant, and must flee as far as he can, and he may only kill his assailant when escape is no longer possible, as when he is penned in by a wall or a ditch. It is right for a man to defend his life, but he must make an honest attempt to get away, and he has no right to use fatal violence if he can escape.

"A man may not say 'I believed my life was in danger' in excuse for homicide. It is whether you gentlemen believe that a man of ordinary coolness was in imminent danger of his life, or of severe bodily injury, with no chance of escape. Would a reasonable man have believed his life in danger?

"It is not a case of necessity if any other means of preserving life remains. I am asked to charge you gentlemen, on behalf of the defendant, that if he had heard that Mr. Patten had made such threats as to put him in fear for his life, he was justified in defending himself in the manner he did. I decline to do so, as no threats will justify the taking of human life unless there be an attempt to execute them.

"You must take into consideration every part of the testimony as to what occurred the afternoon of the 12th of November, in what manner the defendant acted, how soon he turned around, and whether he could see what sort of weapon was used by Patten—was it a sort of weapon likely to put him in fear of his life? The stick has been shown and testified to. You see it was soft, the grain was not tough. If Mr. Bridges had an opportunity of getting away he should have availed himself of it, rather than killed Patten.

"I cannot rule as asked by the counsel for the defense, that if Bridges was satisfied that threats had been made against his life that you should acquit him. Mere threats of bodily harm do not justify violence.

"I am also asked to rule that if the defendant was in a nervous or excitable state when attacked that you should acquit him. That is not the law."

To such portions of the charge as above set out the defendant, by his counsel, excepted.

The jury found the prisoner guilty of manslaughter in the sec-

ond degree, to which verdict counsel for defendant excepted as being against the law and the evidence.

The Court, in addition to the various matters excepted to, instructed the jury that "to make a homicide excusable on the ground of self-defense the danger must be actual and urgent. No contingent necessity will avail; and when the pretended necessity consists of the as yet unexecuted machinations of another, the defendant is not allowed to justify himself by reason of their existence. The right of resorting to force, upon the principle of self-defense, does not arise while the apprehended mischief exists in machination only, nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury. He must first retreat as far as he safely can to avoid the violence threatened by the party he is obliged to kill. The retreat must be with an honest intention to escape, and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of the assault will permit him, and then in his defense he may kill his adversary. This law is the best, the safest, the most conducive to morality, safety and protection of human life."

The Court also said: "There are three degrees of manslaughter. I do not agree with the counsel for the defense, that it is the province of the jury to weigh the consequences of the result of a conviction in the several degrees and apportion punishment in this case; that responsibility rests with the Court. You must find the degree from your estimate of the facts of the case."

We consider this last instruction to be correct, and that it covers the exception on this point.

The case of *Grainger vs. The State* (Tennessee), 5 Yerg., 459, cited by counsel for the defendant, has been frequently overruled, explained or disregarded.

In *Rippy vs. The State* (Tennessee), 2 Head., 117, Carruthers, J., in delivering the opinion of the Court, thus alludes to it: "The doctrine of the Grainger case, as explained by that of Copeland (7 Hump., 429), is undoubtedly the law. Yet no case has been more perverted and misapplied by advocates and juries."

We consider the contention made on behalf of the defendant, that he was in fear of his life, and was therefore authorized to

carry a loaded revolver for protection, and to use it as he did, is untenable.

It appears to us by his conduct he evinced no such fear, but armed himself for the purpose of shooting the deceased on the slightest provocation. Supposing a community to be without an authoritative police government, a person may be justified in sacrificing the life of another, actually seeking his life. But it is otherwise where there is opportunity to invoke the interposition of the law. A man who believes his life is in danger, but whose rights are not as yet attacked, ought, if he has access to a tribunal clothed with the ordinary powers of a justice of the peace (which is the case in this Kingdom, Penal Code, Chap. 47), to apply to such tribunal to interfere. If he have ground enough to excuse him in killing the person from whom he believes himself in danger, he has ground enough to have that person bound over to keep the peace or committed in default of bail. Wharton's Criminal Law, Sec. 487.

The present is the first case of exactly this character in this Kingdom, and it becomes the duty of the Court to declare the law on the subject. The law has at all times been jealous of human life, and a person who slays another does so at his own peril, and must show matters in justification, excuse or mitigation to the satisfaction of the jury.

That eminent judge, Sir Michael Foster, states the law as follows: "Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force, and even his servant attendant upon him, or any other person present may interpose for preventing mischief, and if death ensueth the party so interposing will be justified. In this case nature and social duty co-operate." Fost. Cr. Law, p. 274.

Mr. East, 1 P. C., p. 271, states the law as follows: "A man may repel force by force in the defense of his person, habitation or property against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is called justifiable homicide."

The killing is limited by the rule of necessity, upon which the right to kill in defense of person, habitation or property is universally placed, and such necessity is a question for the jury on the evidence.

"If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot and may kill or wound the person by whom he is assaulted.

"If a person is assaulted by another without any fault of his own with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting until he (the person assaulted) has retreated as far as he can with safety to himself."

But this is always subject to the rule that he inflicts no greater injury in any case than he in good faith and on reasonable grounds believes necessary when he inflicts it. Stephens Cr. Law, Art. 200.

The principles here enunciated were recognized in the early history of this Court (1853) by Lee, C. J., in *Rex vs. Sherman*, 1 Hawn., 88.

Sherman was a gaoler and was called to a cell in the Fort to quell a disturbance, and he killed a prisoner named Burns, for which act he was indicted for murder. The prisoner contended that he was doing nothing more than a lawful act in quelling the disturbance, that he was in the strict path of duty, repelling force by force, and that even allowing he killed Burns, he did it in self-defense and the killing was justifiable homicide. The learned Chief Justice told the jury: "Where an officer is resisted he may repel force by force, and he will be justified in so doing, even if death should ensue; yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. If you find that Sherman used an undue degree of force in this case, that he dealt the blow when not acting in self-defense, it was a base and cowardly act, for which he should answer, and the least we can call it is murder in the second degree or manslaughter."

We have carefully considered the several requests as to instructions by the defendant's counsel and the exceptions to the rulings

given, and we are of opinion that no error was committed by the Court in refusing to charge the jury as requested by defendant's counsel, nor in the charge as given.

The instructions given, in our opinion, are in accordance with the law as recognized by the English and American authorities, and are substantially the same as have at all times been given and held proper by the judges in those countries, although in many cases they have been and are disregarded by juries, who it is well known often decide cases from motives of sympathy and with the idea that the defendants may be morally justified under the peculiar circumstances of each particular case, and with whose verdicts, when rendered in favor of the defendants, the courts cannot interfere.

But we hold the law to be that when a person takes the life of another under the plea of self-defense it is for him to show the actual necessity for the act: that the person killed was in the act of committing some felony, or in the act of committing grievous bodily harm upon the slayer under such circumstances as would induce a reasonable belief from the manner of the assault and the weapon used that the danger was imminent and nothing short of taking the life of the aggressor would prevent it. No threats, no provocation by insulting language, gestures or acts, unless accompanied by all the circumstances before mentioned, will justify or excuse the taking of human life.

And although in earlier times it was the custom of the Court to direct juries to find the facts specially and for the Court afterward to decide whether such facts were sufficient in law to justify or excuse the homicide, the modern, and indeed the universal, practice in the United States has been to leave the whole case to the jury, as was done in this case, with a statement of the law applicable, and for them to decide the matter.

In this case the jury, in their judgment—no doubt from, as they thought, some extenuating circumstances—found the defendant guilty of manslaughter in the second degree, thus mitigating the penalty prescribed for the offense as charged.

We agree with such verdict, and cannot say that it is against either the law or the evidence, but was fully justified by the evidence.

We think the whole of the exceptions should be overruled, and so order.

Attorney-General Neumann, for the Crown.

W. R. Castle and Jona. Austin, for defendant.

Honolulu, October 5, 1885.

J. C. MERRILL & CO. vs. A. JAEGER, EXECUTOR OF F.
T. LENEHAN.

EXCEPTIONS FROM RULINGS OF AUSTIN, J.

JULY TERM, 1885.

JUDD, C. J; McCULLY and AUSTIN, J. J.

The Court is not required to put propositions to the Jury, although correct, in the very language used by counsel, nor to give again, in the terms proposed by counsel, what has already been given.

The jury having found that certain goods shipped by plaintiffs to defendant were to be considered a consignment and not a sale; held that the verdict was not without evidence to support it, nor contrary to clearly preponderating testimony, and must stand.

Exceptions overruled.

OPINION OF THE COURT, BY McCULLY, J.

THIS case was tried at the last January Term, when a verdict was rendered for the plaintiffs for \$791 83 with interest. The verdict was set aside and a new trial had in the April Term, when verdict was given for the defendant. The plaintiffs now bring exceptions and ask for a new trial.

The case may be given by quoting the statement of the Chief Justice, in rendering his decision granting a new trial, as follows:

"This is an action to recover \$872 45, stated in the bill of particulars, as follows: 'For 200 bales of hay shipped from San Francisco to Honolulu, by the bark *Wrestler*, on the 1st April, 1881,

JULY, 1885.

on account of F. T. Lenehan & Co., at Honolulu, and
 duly received by them on their account..... \$ 413 10
 Freight on the same..... 202 82

For 14 M hard pressed bricks, shipped from San
 Francisco for Honolulu, by bark *D. C. Murray*, on the
 13th August, 1881, on account of F. T. Lenehan & Co.,
 at Honolulu, by their order and duly received by them,
 including freight..... 476 00

Moneys paid to Macfarlane & Co., by F. T. Lenehan
 & Co., and improperly charged to them by J. C. Merrill
 & Co., August, 1881..... 75 00

Total..... \$1,166 92

with interest upon the said amounts at one per cent. per month,
 from the said dates, respectively.

CONTRA ACCOUNT.

Amount credited J. C. Merrill & Co., by account of sale of hay
 per *Wrestler*, due 15th September, 1881,

\$ 103 47

18th August, 1881. Net proceeds of sale of 14 M
 bricks by J. C. Merrill & Co., and credited to F. T.

Lenehan & Co..... 191 00

\$ 294 47

with interest from the said dates at one per cent. per month.

Balance due J. C. Merrill & Co., \$872 45."

The following bill of exceptions was allowed by the late Mr.
 Justice Austin, holding the April Term.

"Be it remembered that at the trial of the said cause the fol-
 lowing evidence was taken, to wit:

EVIDENCE FOR THE PLAINTIFF.

F. A. Schaefer sworn: Am familiar with freighting between
 here and San Francisco, in the last part of 1881 and 1882; for
 compressed bales of hay, I think the freight was \$1 25.

Letters from F. T. Lenehan & Co., to J. C. Merrill & Co. The
 following extracts of letters were read in evidence on the part of
 the plaintiff:

11th December, 1880, per *Consuelo*.

P. S. 'Please ship a large quantity of hay and bran, and a moderate quantity of oats, say 300 bags, all shingles (cedar), R. W. posts, 200 bbls. lime, G. & W. H. barley, Golden gate extra flour, all which will show a good freight profit.'

18th December, 1880.

'You can, with safety, send down by her (Murray) the following goods, viz:

150 bbls. Golden Age extra family flour.

150 bbls. Golden Gate extra family flour.

3000 R. W. Posts.

500 Bales of choice California Hay, not compressed.

250 Bags Bran.

200 Bags Oats.

100 bbls. lime.

100 B. boxes of medium bread.

10 M Cedar shingles.

All of which will meet with ready sale, a profit and pay a good freight for the vessel.'

January 4, 1881, per *Murray*.

'Return freight by Bk. D. C. *Murray*. You can ship the following goods by her, on our account:

F. T. L. & Co. 250 bales best Cala. Hay.

" 100 bags best Cala. Oats.

" 200 bags Bran.

" 50 bbls. English Portland Cement.

and oblige. Please purchase the above at the lowest market rates, and on the best terms.'

18th Jan., 1881, per *City of Sydney*.

'Hay: Whenever you have any spare room on your vessels you can always send from 200 to 300 bales of good California hay, which we can always dispose of to good advantage to our customers.

Bran & Oats:—The same remarks apply to these articles.'

31st Jan., 1881, per *Kalakaua*.

'Hay: There is not a pound of this article to be purchased in town at present, and we think it would pay you well to send always as much as possible on ship's account by each vessel; when-

ever you have any space left, fill it up with good hay (compressed or otherwise), bran and oats, and it will always pay well.'

14th Feb., 1881, per *Australia*.

'Please forward by the return of the bark *Kalakaua*, the following goods, viz :

F. T. L. & Co. 400-4 sacks Golden Gate extra flour.

" 50 bags Yellow Corn.

" 100 bales best California pressed Hay.

" 100 bags Bran.'

5th April, 1881, per *Kalakaua*.

'Bark *Wrestler*: We are looking daily for this vessel, and trust that she will bring a good load of Bricks, Lime, Hay, Flour, &c.'

7th May, 1881, per *Wrestler*.

'Bark *Wrestler* arrived here on the 21st ult., after a passage of 21 days from your port, and has delivered her cargo in good order, with the exception of some bales hay damaged by the bricks.

9th May, 1881, per *City of Sydney*.

'Bark *Wrestler*: This vessel arrived here on the 21st ult., and delivered her cargo in good condition, with the exception of about 20 bales of hay, which was more or less damaged by coming in contact with the bricks. We made no claim upon the ship for the same, as we did not wish to damage the reputation of the vessel, and think the Captain will appreciate our action in the matter.

Hay: We were very much inconvenienced by your sending us 200 bales of hay without orders by the *Wrestler*, as we did not need it, besides we had ordered 150 bales to come down by the *Murray*. The hay market is completely glutted, consequently we have to hold it. Hay has been sold on the wharf at \$25 per ton, which is below its cost. Please do not send us any more goods without orders in future, as it is very apt to put us to some inconvenience and loss when goods arrive which we do not anticipate.

Bolles & Co.: We enclose a copy of a letter from this firm, wherein they decline receiving the 100 bales hay sent them by your goodselves, on account of it being inferior, consequently we have had to pay freight on same and pay your draft upon them

for the said hay. We have had to store it on account of the market being glutted with this article. The quality is poor, but we will endeavor to close it out at the very first suitable opportunity.'

18th May, 1881, per *Murray*.

'Hay: We regret the loss on this article, but we did the best we could for you. The market is completely glutted, in fact a lot was sold at auction to-day for \$21 a ton. We will meet quite a loss on the 200 bales which you sent us ex *Wrestler*.'

6th June, 1881, per *Australia*.

'We have already addressed you by this conveyance, and the object of this mainly to enclose account sales of 100 bales hay, received ex bark *Kalakaua*, showing net proceeds \$214 78 to your credit in account.'

4th July, 1881, per *City of New York*.

'Hay ex *Wrestler*: We have treated this invoice as a consignment, and have stored the whole lot on your account. The hay market is completely glutted, and it is impossible to make sales unless at a heavy loss, we therefore hold same for an advance in price—to sell at auction would be simply to give it away.'

30th July, 1881, per *Zealandia*.

'The hay invoiced per *Wrestler*, \$413 10, is still on hand, and as we never ordered it, we cannot take it, but will dispose of it on best terms, at the earliest opportunity. The market is completely glutted with hay, and we are surprised at your action in continuing shipping the article in the face of such facts.'

6th August, 1881, per *Kalakaua*.

'Hay: We cannot sell this article at anything like its cost, we tried a small lot of 30 bales at auction, and it only brought \$1½, will we hold it for better price?'

25th August, 1881, per *City of Sydney*.

Account sales: We now beg to enclose the following account sales of goods sold on your account:

Sales bran, shingles, firewood, per *D. C. M.*, N. P., due

Sept. 30..... \$ 610 86

Account sales, hay ex *Wrestler* per *D. C. M.*, N. P.,

due Sept. 15..... 103 47

All of the documentary evidence introduced at the said

trial, including extracts of letters from J. C. Merrill & Co., to F. T. Lenehan & Co., and account sales, accounts current, invoices and manifests are hereby referred to and made a part of this bill of exceptions.

The Court charged the jury in part as follows :

'The case has been fully presented by counsel. The facts are before you. As to 200 bales of hay, it is conceded by plaintiffs' counsel that it was not shipped on an order. When it arrived here, defendant was not obliged to take it. If that position was not changed, plaintiffs cannot recover as to the hay. You have heard the explanations of counsel and the letters and the testimony on both sides. You have the right, if you choose, to say that the letters characterized the keeping of the hay. If you consider there was the relation of principal and agent, from the letters, and all the facts in the case, it is for you to say. If letters should convince you this was so—that defendant was agent as to the hay, then your verdict would be against plaintiff as to the hay. If the letters and all the facts show a sale consummated, then the verdict should be for plaintiff. If plaintiff recovers as to the hay, there is to be a deduction of some \$70 or \$80.'

At the close of the charge to the jury the counsel for the plaintiff asked the Court to further charge as follows :

If the 200 bales of hay were sent to F. T. Lenehan & Co., as a sale, and he accepted the sale and admitted to J. C. Merrill & Co., that he held the hay on his own account, then F. T. Lenehan & Co. could not afterwards repudiate the sale.

But the Court refused to charge on this point, except as above, to which refusal as aforesaid the plaintiff by his counsel excepted.

The following evidence was also taken in the said trial :

F. A. Schaefer, sworn : Know Merrill—was his agent—some years ago—(identifies power of attorney)—do not know of any partners in J. C. Merrill & Co. Am familiar with freighting in 1881 and 1882, for compressed bales hay, freight was \$1 25, I think.

Cross-Ex. Don't think I was Merrill's agent when this suit commenced. My agency terminated, I think, January, 1884. Merrill has no agency here now, I believe. This is not Merrill's

first suit against Lenehan. Don't remember first suit. Recollect being at trial about two years ago. This is third trial, I think.

Redirect. Power of attorney (exhibited) never revoked. Acted under it in this suit.

H. R. Macfarlane, sworn : (for plff.) Knew Lenehan. In 1881 had dealings with him in freights—general freights—molasses probably more than anything else. Had difficulty with molasses. He engaged to take molasses—got it on wharf—he could not take it on *Wrestler*—then it was to go on *Kalakaua*—didn't go—then it was to go on *Murray*—but it didn't go—all this happened within six weeks. Then he compromised, I think, for \$75. First shipment was to be 250 bbls.—carted, coopered and had to be taken. The second time it was displaced again by sugar, which was more profitable. Tonnage was scarce then. It finally went, some in his, some in other vessels.

Cross-Ex. Recollect conversation with Captain of *Wrestler*. He said he could not possibly carry any molasses.

W. C. Wilder, sworn : (for deft.) My firm ordered facing bricks from Lenehan & Co.—2,000—they were not good—unsizable and poor colors—8,000 more were offered—we refused them, because they were worse than the first. We had ordered 20,000 or 30,000—then we countermanded the order. They were not delivered promptly.

Cross-Ex. Am not a brick-layer—knew the bricks were bad from their looks. They looked like culls—we used the first 2,000 somehow—I know the 8,000 were worse than the 2,000. We built the store with another lot of bricks from San Francisco—these were good bricks.

E. B. Thomas, sworn : (for deft.) Been brick work contractor for twenty-four years—built Wilder's block. Don't know where they got bricks for facing—my attention was called to some bricks that came early in the stage of building. First lot was 2,000—many culls—one-fourth of an inch difference in size—some dark, some light. For facing, you must use bricks of a size. Don't know whether any of these bricks were used—I didn't see the 8,000 lot. Think they were condemned and taken out of ship. Don't remember going to wharf with Wilder to work at them.

Cross-Ex. Never saw any bricks but first 2,000. Heard that some of the 2,000 were used—don't know—they don't send first-class bricks to these Islands—no first-class front bricks ever came here. There are no first-class front bricks in Wilder's block. The first lot of 2,000 were very bad.

T. B. Walker, sworn: (for deft.) Brick-layer for twenty-two years. Remember when Wilder's block was built—Lenehan then had pressed bricks—asked me to look at them—I told him they were very inferior. I saw one lot at Widemann's lot, near West's. They varied in thickness—colors were not so bad—but they had to be sorted. I had told Lenehan I wanted some bricks, but not like them—I told him I could not pay price of pressed bricks for these—they were worth no more than common bricks. Good pressed brick costs \$37—common brick, from \$15 to \$20. Don't know how many I saw on Widemann's lot—I went with Lenehan to a vessel to look at some bricks—they were also inferior—some bricks were handed up from hold—they varied in thickness—labor in sorting them made them cost more than first-class bricks—they were not suitable for facing bricks—decidedly not the kind to put in a building like Wilder's.

Cross-Ex. In cornice work cutting bricks requires a deal of labor. I saw bricks that Wilder's building were made of—did not examine them.

A. Jaeger, sworn: (for deft.) Defendant. Have known Lenehan for twelve years. Remember when he went into business for himself, about four years ago. My relations with him were rather intimate. I am pretty well acquainted with his business. He had one of Widemann's warehouses, where he occasionally kept flour and bran—it was a small house. He did not keep flour and hay about his premises—if he had, I should have known it.

Cross-Ex. About June 1, 1881, he took another larger warehouse. Don't remember exactly when he had hay there. I have seen hay there.

The jury returned a verdict for the defendant, whereupon the plaintiff, by his counsel, excepted to the said verdict, and gave notice of a motion for a new trial, on the ground that said verdict was against the law and the evidence, and on the 1st day of

May the Court made a *pro forma* ruling, refusing the said motion, to which ruling the plaintiff, by his counsel, excepted."

BY THE COURT.

From the foregoing lengthy exhibit of evidence offered on the trial, as well as from the previously quoted statement of the substance of the pleadings, it appears that, as to two items, the claims for the hay and the bricks, the single question was one of fact, whether the transactions were consignments or sales, and as to the third item, the charge upon the molasses, this was a question of fact, whether the defendant's decedent was acting as the plaintiff's agent. The instructions of the Court placed these matters before the jury solely on the evidence as submitted. No exception can be sustained as to the finding of the jury under this instruction given. But the Court refused to give a further instruction asked for by the plaintiff's counsel, this, namely, that "If the 200 bales of hay were sent to F. T. Lenehan & Co. as a sale, and he accepted the sale, and admitted to J. C. Merrill & Co. that he held the hay on his own account, then F. T. Lenehan & Co. could not afterwards repudiate the sale."

We think this instruction might have been given, but we are further of opinion that it had been substantially given in the previous instructions. The Court had charged that "If the letters and all the facts show a sale of the hay consummated, then the verdict should be for the plaintiff." For a "sale consummated" once, fixed the liability of the defendant, and there could be no question of repudiation afterwards. There was nothing in the pleadings to support a question of repudiating a sale which had been "consummated," that is, made and completed, and so rendering the vendee liable to the vendor for the price of the goods. An instruction that the jury must find from the evidence whether the sale was "consummated," did not need a repetition with a supposititious instruction that the vendee could not afterwards repudiate the consummated sale.

We understand the rule of law to be that the Court is not required to put propositions to the jury, although correct, in the very language used by counsel, nor, further, is required to give again, in the terms proposed by counsel, what has already been given.

The King vs. Henry Cornwall, 3 Hawn. 154.

In *Conley vs. Meeker*, 85 N. Y. 618, held "That a Court is not bound to put any proposition, although it be correct in itself, to the jury in the very terms formulated by counsel; if the jury are correctly instructed as to the point, the party is not legally harmed."

Also *Morehouse vs. Yeager*, 71 N. Y. 594. *Day vs. O'Neill*, 36 N. Y. 594.

For the rest, the finding of the jury cannot be considered to be without evidence which might support it, or to be contrary to clearly preponderating testimony, and must stand.

Forbes vs. Gibson, 3 Hawn. 260. *Montgomery vs. Pfluger*, 3 Hawn. 388. *Rez. vs. Asegut*, 3 Hawn. 526. *Wight vs. Jones*, 3 Hawn. 755. *Foster vs. Luaialani*, 4 Hawn. 477.

The exceptions are overruled.

S. B. Dole, for plaintiff.

Ashford & Ashford, for defendant.

Honolulu, October 2, 1885.

RUTH PUUKAIAKEA *et al* vs. HIAA (w).

APPEAL FROM DECISION OF PRESTON, J.

OCTOBER TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

An instrument in the form of a deed, reserving a life interest to the grantors, held not to be a will, but a valid deed.

Delivery and acceptance by the grantee held to be proved sufficiently.

The common law rule, that a deed creating an estate *in futuro* is void, has never been adopted by the Courts of this Kingdom.

The common law is not in force *eo nomine* in this Kingdom: its technical rules are in force here only as they may be adopted.

Decree affirmed.

OPINION OF THE COURT, BY McCULLY, J.

THE complainants set forth that they are husband and wife, now elderly and infirm. That in February, 1881, they executed an instrument in writing "as and for a will and nothing more and nothing less." The material parts of this instrument, translated from the Hawaiian, are as follows:—"Know all men by these presents that we Ruth Puukaiakea and Kailio her husband * * * * in consideration of love and affection and one dollar paid each of us by Lota Kuokoa Hoopii our beloved grand-child, by these presents sell, grant and confirm unto the said Lota, his heirs, executors and assigns forever * * * * (reciting a descent by inheritance to plaintiff Ruth and describing the lands conveyed, including also one parcel belonging to Kailio). And we also declare publicly that this conveyance shall take effect with full power after our death, but while we yet live we have the power of the lands. * * * Therefore, by these presents, all of the above pieces of land together with the houses and all the appurtenances belonging thereto, are hereby conveyed to Lota K. Hoopii, his heirs, assigns, &c., forever, and we bind ourselves, our heirs, &c., to adhere to this agreement."

The above was signed by the parties plaintiff, with the signature of two witnesses to the execution and delivery, and was recorded as a deed within the month.

Lota has since died intestate, leaving no issue. His surviving parent has made a quit claim deed of interest in what remains of the lands conveyed. His widow, who is made the defendant herein, is alleged to claim a present right to the possession of one-half thereof.

The bill prays that the defendant may be enjoined from making such claim: That the devise intended in and by the said instrument may be decreed to have lapsed upon the death of Lota: That the instrument be vacated, &c.

By the Court: It is quite likely that this instrument was intended for a will as being a deed which would render a will unnecessary, but in no other sense. The grantor, Kailio, gave his testimony: his wife was too infirm to attend Court, and the subscribing witnesses were produced and gave their testimony. The evidence totally fails to support the position that the plaintiffs

intended to make an instrument of different purport or effect from the one they executed; although Kailio testifies: "We did not intend that Lota's heirs should have the property if he died before we did; we did not think of Lota's heirs at the time." However, all parties treated the conveyance as a grant with reservation of a life interest to the grantors. The grantors remained and yet remain in possession and control of the property. Two sales of parcels were made, and the deeds were made by the holders of the life interest, the grantee of the remainder joining in the deed and even permitting the original grantors to appropriate the proceeds of the sales.

The learned counsel for the complainants contends that although the instrument may have the form of a deed it is not valid, for sundry reasons. First, there is no proof of delivery to and acceptance by the grantee. But it appears, by what is stated above, that the grantee has signed two deeds, in the character of reversioner; that the subscribing witnesses certify to a formal delivery, and that the deed was placed on record. Second, that the instrument, considered as a deed, must be construed to create a freehold commencing *in futuro*, and is therefore void by the rule of common law. This Court has repeatedly denied that the common law was in force *eo nomine* in this Kingdom. See *The King vs. Agnee et al.* 3 Hawn. 106. Its technical rules are in force here only as they may be adopted.

This rule is based on the necessity which once existed, but has now passed away, of livery of seizin. It has been expressly abolished by statute in many of the American States which were bound by the whole common law except as controlled by statute. In this Kingdom this rule has never been adopted by the Courts.

We do not know that the question has been directly raised upon any deed of like character, but such deeds have been considered valid. See *Keliikanakaole vs. Kawaa*, ante, 134.

No injunction should issue. The plaintiffs have only to remain in possession of their estate.

The decree is affirmed.

M. Thompson, for complainants.

Kinney & Peterson, for defendant.

Honolulu, October 21, 1885.

KAHUI *et al* vs. LAUKI *et al*.

EXCEPTIONS TO RULINGS OF McCULLY, J.

OCTOBER TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

At the trial of an action of ejectment Defendants put in a defense of adverse possession: plaintiffs produced evidence in rebuttal: defendants then, under plaintiffs' objections, were allowed to bring testimony contradicting plaintiffs' evidence in rebuttal.

Held there was no ground for plaintiffs' objections, for the evidence did not seek to establish new facts, but to contradict testimony for plaintiffs, which could not have been anticipated by the defense. Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of ejectment and was tried at the last July term before McCully J. and a Hawaiian jury, when a verdict was returned for the defendants.

The plaintiffs at the trial made out a *prima facie* case, showing the legal title of the land in question to have been in one Kimo, and that they were his heirs.

The defendants called several witnesses, among them one Lahaina, in order to prove title by adverse possession.

The plaintiffs, in rebuttal, put in evidence showing that the plaintiff Kahui had exhibited the Royal Patent (to his ancestor) of the land, in the presence of the defendant Lauki, at a meeting of the hui of Wainiha, Kauai, and claimed the land, and the defendant, although seeing it, did not demur thereto or mention any claim of his own to the land. The plaintiff Kahui also testified that he had taken taro from the land in 1875, while on a visit to Wainiha, under a claim of right, with the assent of the defendant.

The defendants then tendered the following evidence, which was objected to on behalf of the plaintiffs as incompetent, irrelevant and inadmissible at that stage of the case. The evidence was admitted by the Court, to which the plaintiffs excepted:

Lahaina (recalled)—“I was present at the meeting of the hui of Wainiha when those owning kuleanas were called on to exhibit their papers therefor. Kimo did not exhibit his Patent on that occasion; only Kaleikini exhibited a Patent.”

Lauki sworn—“I never knew Kahui to take taro from my land. He never asked me for any taro, and I never gave him any.”

Counsel, on the hearing of the bill of exceptions, contended that when a defendant claims by adverse possession it is incumbent upon him to put in his whole case, to which he cannot add or take from after it is in. His case is then closed by all rules of practice and customs of courts, and he is not at liberty to contradict the evidence in rebuttal of the plaintiff. If the matter is in the discretion of the Court, then the Court wrongly exercised its discretion. The plaintiffs were prejudiced by the admission of the evidence objected to, for if they could have foreseen that this evidence would have been admitted they would greatly have strengthened their case in rebuttal by other and further evidence, but were misled by the idea that they had the last say, and put in their case accordingly.

BY THE COURT: The Court is not responsible for the manner in which parties conduct their case. We think there is no ground for the objections taken by plaintiff. The evidence objected to is, in our opinion, clearly admissible. The plaintiffs did not cross-examine the witness Lahaina as to what took place at the meeting of the hui, which they might have done, but apparently relied upon their supposed right to shut out further testimony. The evidence was admitted in contradiction of two statements made on behalf of plaintiffs, and we think a great injustice would have been done to the defendants had it been rejected. The evidence did not seek to establish new facts, which would not have been admissible, but merely contradicted statements made on behalf of the plaintiffs, which could not have been anticipated by the defense.

The exceptions are therefore overruled.

Kinney & Peterson, for plaintiffs.

J. M. Poepoe, for defendants.

Honolulu, October 28, 1885.

V. V. ASHFORD vs. LOUIS TITCOMB: A. DREIER,
Garnishee.

QUESTION RESERVED BY JUDD, C. J.

OCTOBER TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Default and judgment were entered against defendant, in a term case, by a Judge at chambers, in vacation. The garnishee paid into Court the money in his hands, before the opening of the term. At the term defendant moved to open the default and vacate the judgment, for non-conformity to the statute.

Held, that all the proceedings were regular, under Section 1109, Compiled Laws; and that all reasons for setting aside default and vacating judgment must be addressed to the discretion of the Presiding Justice at the term.

OPINION OF THE COURT, BY McCULLY, J.

THIS matter comes before us on proceedings had October 9th, of which the record is as follows:

Default and judgment herein having been entered on August 28, 1885, defendant Titcomb now moves to open the default and vacate the judgment. After hearing the argument, the Court reserves the question for the full bench as to whether the default and judgment were properly entered in vacation, and takes under advisement the question of opening default.

Setting aside a default and vacating a judgment lies in the discretion of the Court, and is not to be reviewed in an Appellate Court. Freeman on Judgments, Sec. 90.

The argument before us extended beyond the the question of the legality of the entry of default and judgment, which alone the Appellate Court can consider, and was addressed to considerations which might affect the court of first instance. We leave them to that Court.

The record shows that a writ was issued July 25th, on complaint for recovery of a promissory note of \$1,000, given by defendant Titcomb to Geo. Mundon & Co., January 8, 1885, at

three months, with interest, and by Mundon & Co. endorsed to plaintiff. Personal service was made on the principal defendant, August 6th; August 28th, the clerk of the Court certified that no answer had been filed. The garnishee, Dreier, had in the meantime responded in writing that he held of the defendant's property \$1,095 82, to the amount of which he held himself liable. Upon the clerk's certificate and the answer of Dreier, Mr. Justice Preston in chambers signed an order placing the defendant in default, and ordering judgment to be entered against him upon an assessment by the clerk of the amount due and costs, and against Dreier for so much thereof as he had confessed to, and such judgment was entered forthwith. Dreier has paid the amount for which he confessed.

The statute, Sec. 1109, provides that upon failure of the defendant to put in an answer within the time specified in the summons (Sec. 1106 and Sec. 1101) which is twenty days, the plaintiff may prove service, for which the return of the Marshal will be sufficient proof, unless it is controverted, and prove default in answering by the clerk's certificate, and upon these two proofs shall be entitled to demand and receive of the Court or a Judge in chambers an order of default, and authorize the clerk, if the demand be upon a promissory note, to assess the amount and enter judgment therefor.

The defendant claims that in this case there was some want of formality or regularity by the non-appointment of a day or hour for taking the default, or because it was done in the private chambers of the Judge, or without some other record of what was done than the order itself, or because it was done two days after the expiration of the twenty days, or done in vacation.

We fail to see in any of these matters a non-conformity with the statute. There is no provision limiting the opportunity of taking an order of default to the day when it may first be taken. There is no notice to be given to the other party that a default is to be asked for. It is provided that it may be done by the Court or by a Judge in chambers, that is, in term time or "in vacation." And after judgment is entered, there is nothing in the statute to prevent recovery upon it by the usual methods. In the present instance, the garnishee availed himself of his privilege of an-

swering before the opening of the term, and so became liable for the amount held by him immediately upon the entry of judgment, and paid it forthwith. This was nothing but a consequence of the entry of judgment, and could have been enforced by execution.

If there is any reason for setting aside the default and vacating a judgment, now for the most part satisfied, it must, in our view, be addressed to the discretion of the presiding Justice of the term. It is to be remarked that no affidavit of a good defense has been filed, as required by the amendment of 1876 to Sec. 1106.

Our opinion is, therefore, that the proceedings were in all respects regular and as authorized by the statutes.

Ashford & Ashford, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, October 29, 1885.

KAUHIKOA vs. HIKAALANI HOBROK *et al.*

QUESTION RESERVED BY McCULLY, J.

OCTOBER TERM, 1885.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Defendants held certain land as devisees by virtue of the adverse possession of their testator and two others. Plaintiff claimed half the land, as tenant in common with defendants' testator. Defendants, at the trial, moved the Court to direct a verdict for them, on the ground that their testator was the survivor of the three disseisors. The Court reserved the question.

Held, that defendants' testator, being the survivor of joint disseisors, became solely entitled to the land.

Verdict for plaintiff set aside, and judgment entered for defendants.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of ejectment to recover an undivided half of

a piece of land situate in Kalia, Waikiki, Oahu, and described in Royal Patent No. 3441, to one Alapai.

The case was tried at the last July Term, before McCully J. and a mixed jury, when a verdict was returned in favor of the plaintiff.

The plaintiff claimed through Kuheleloa (w), the wife of the defendant Hobron's testator, Kalaeone, who survived her. The plaintiff is the sole surviving heir-at-law of Kealii (k), who was the brother of Kuheleloa.

In a previous suit (*ante* 104) brought against the same defendants by Mahukalilili, who claimed the land in question, through Nihoa, a daughter of Alapai, the patentee, the defendants set up a title by adverse possession, through Kameenui, her husband, Kalaeone, and her sister, Kuheleloa, who became the wife of Kalaeone on the death of her sister. That case resulted in a verdict for the defendants on the issue of adverse possession.

The present plaintiff, by his complaint, sought to recover the land, claiming to be the sole heir of Kuheleloa, but subsequently limited his claim to one undivided half, as tenant in common with Kalaeone, Kuheleloa's husband. The relationship was proved at the trial.

On the conclusion of the plaintiff's case, counsel for the defendants, Hobron and wife, moved the Court to direct a verdict for defendants, on the ground that Kalaeone, the defendant's testator, was the last survivor of the three original disseisors, Kalaeone, Kameenui and Kuheleloa. The Court declined to give the direction requested, but reserved the point for the consideration of the full Court.

The question was argued on the 14th instant. On behalf of the defendants it was contended that the disseisin of Alapai or Nihoa, his heiress, having been effected jointly by Kalaeone, Kameenui and Kuheleloa, their estate became one of joint tenancy, and on the death of Kameenui and Kuheleloa the property became vested in Kalaeone, the survivor, who died in possession and devised to the defendant, Mrs. Hobron. Counsel cited, Tide-mann on Real Property, Sec 286, 287: *Putney vs. Dresser*, 2 Met. 588: Littleton, Sec. 278: Kent's Commentaries, 12 Ed., Vol 4, p. 360.

On behalf of the plaintiff it was urged that no joint tenancy was created, because "an estate in joint tenancy can only arise by purchase or grant, that is, by the act of the parties, and never by the act of law." 2 Bl. Comm., p. 180; 1 Wash. Real Property, p. 643; Tideman R. P., Sec. 236; 2 Greenleaf Cruise R. P., 364, Sec. 3.

BY THE COURT.

We are of opinion that the defendants are entitled to judgment herein.

The disseisin of Nihoa, the heir to Alapai, was, if not effected by Kalaeone himself, by him and Kuheleloa jointly; his wife, Kameenui, could not be a joint disseisor with her husband. Consequently, on the death of Kuheleloa, it is undoubted law, accepting the doctrine of the common law, that Kalaeone, as the survivor, became solely entitled.

Littleton, Sec. 278, says: "If two or three, etc., disseise another of any lands or tenements to their own use, then the disseisors are joint tenants."

In *Putney vs. Dresser* this is stated to be the law in Massachusetts, notwithstanding the statute abolishing joint tenancy, which was held to apply only to cases arising under deeds or wills.

In *Allen vs. Holton*, 20 Pick. 458, it is held: "If one of two disseisors, in possession of land as tenants in common, abandons the land, the abandonment does not enure to the benefit of the disseisee, but the co-tenant holds the land as against the disseisee in the same manner as if he had been a sole disseisor."

Here the joint tenancy was created, not by the act of the law, but by the act of the parties in joining in the disseisin of the patentee's heir-at-law, therefore the contention on behalf of the plaintiff does not avail.

The verdict for the plaintiff must be set aside, and judgment entered for the defendants.

A. Rosa, for plaintiff.

C. Brown, for defendants, Mr. and Mrs. Hobron.

R. F. Bickerton, for defendants, Kameenui 8d and her husband.

Honolulu, October 31, 1885.

MARY K. STILLMAN *et al* vs. THEO. H. DAVIES *et al*.

APPEAL FROM DECISION OF THE CHANCELLOR.

OCTOBER TERM, 1885.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Plaintiff, as widow of James Woods, continued to live at his homestead and had care of his children; she incurred a number of debts for the support of the children, to an extravagant amount, considering the circumstances of the estate.

Held, that defendants, as trustees of the estate, must pay the debts; they delegated their authority, as to incurring the liabilities, to her, and are estopped from objecting to the results.

OPINION OF THE FULL COURT.

UPON full consideration we see no reason to differ in respect to the principles applied and the facts found by the Chief Justice in this case, as more particularly set forth in his opinion.

The decree of the Court below is hereby affirmed.

F. M. Hatch, for complainants.*

Kinney & Peterson, for defendants.

Honolulu, November 2, 1885.

DECISION OF THE CHANCELLOR, APPEALED FROM.

This is a bill in equity by the widow of the late James Woods, to compel the defendants, as executors and trustees of the estate of Woods, to pay the sum of \$1,908 35, amounts paid and liabilities alleged to have been incurred by plaintiff from the time of the decease of Mr. Woods to 29th December, 1884.

The bill alleges that plaintiff had, during this period, the custody of the persons of the minor children, and was allowed by the executors to remain in charge of the homestead at Kohala, Hawaii, and that she made purchases and incurred liabilities for the proper clothing and maintenance of the minors, in supplies for the household and in making alterations in the house on the premises, which had been projected by her husband in his lifetime, and which was done with the knowledge and consent of one of the

executors. The equity of the bill is founded upon the principle of avoiding circuity of action and a multiplicity of suits.

The position of the defendants is that it was agreed and understood between them and plaintiff that she should be paid a reasonable allowance for the proper maintenance of the minors, but that plaintiff has made many unnecessary, useless, improper and extravagant purchases, and they have already paid her a reasonable allowance for the support of the minors, amply sufficient to cover all reasonable and necessary expenses, and they never agreed to become liable for such expenditures as she should make, etc.

It is not contended that the specific articles which were purchased by plaintiff, and which she seeks to have paid by defendants, are in themselves improper. They are mainly for clothing for the minors and for food consumed in the household. But that during the period when these purchases were made an excessive and extravagant amount was expended. This I find to be true. By the summary submitted Mrs. Woods expended for support of her children at the homestead, from November 29, 1883, to November 29, 1884, the sum of \$4,998 11, or at the rate of \$416 51 per month, exclusive of bills for board and education for children not at the homestead. For six months of 1885, for the same purpose, there was expended under a governess at the rate of \$232 26 per month. If the amount now in contention be added to the expenses for 1884, it would bring the cost of supporting the children to nearly \$600 per month, which I do not hesitate to say is an extravagant amount.

But the executors allowed her to remain at the house, to provide for the household, and for some months paid all orders and bills that were presented, charging them up to the estate and leaving their apportionment to the debit of the widow or the minors for future adjustment. In a previous hearing in this estate these amounts were apportioned and Mrs. Woods was charged with her share, which was deducted from her allowance for dower. The executors were aware that expenditures were being made and liabilities incurred at an extravagant rate, out of proportion to the income of the estate of Mr. Woods, but the amount was not known to them. Mrs. Woods says she was not aware of the condition of the estate, nor was she limited in the amount which she was au-

thorized to expend. A letter from Mr. Davies, 9th April, 1884, urged economy upon her and the necessity of naming a regular amount with which to keep the children and the house, and asking: "If you think \$100 per month, besides the wages for men, will be enough, I will write to Mr. Burchardt, the ranch book-keeper and cashier; but it should be a regular amount, as he must have definite instructions." Mrs. Woods made no reply to this. Mr. Davies endeavored to reach a definite settlement through Mr. Parker, plaintiff's brother, but was unsuccessful, and thus affairs ran on until December, 1884, when Mrs. Woods' marriage and removal to Honolulu necessitated her release of the control of the household.

What is the duty of the Court in respect to these claims?

The amount is far in excess of what was necessary and proper for the maintenance of the minors, and the Court should guard their property from spoliation. But the right of the creditors must be considered. Mrs. Woods was left with general authority to contract for supplies and clothing. Mr. Davies' letter indicates this. He says: "The clothing and pocket money had better come through you." It was quite within the power of the executors to put a definite limit to the amount which Mrs. Woods was authorized to expend. In fact, when lavishness in expenditure on Mrs. Woods' part was suspected it was the executors' duty to stop it, either by withdrawing all credit and providing her with only sufficient ready money, or by naming a stated sum per month, which they would be responsible for, and warning her that any amount over this would not be paid. Mrs. Woods was not one of the executors or trustees, but the defendants were, and were responsible for the expenditures. They attempted to delegate their authority in this respect to her. By so doing they have now estopped themselves from objecting to the amounts.

I think the prayer of the bill should be granted. Let the claims be referred to Mr. Henry Smith, Deputy Clerk, for computation, and on the coming in of his report a final decree will be made.

F. M. Hatch, for plaintiffs.

Kinney & Peterson, for defendants.

Honolulu, September 29, 1885.

KAMIHANA (w) vs. H. F. GLADE, Administrator of H. SCHRIEVER.

QUESTION RESERVED.

OCTOBER TERM, 1885.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

An express trust in personal property may be created, by parol, and, if continuing, is not within the Statute of Limitations.

Plaintiff claimed to recover, from the administrators of her employer, wages for domestic service; and alleged that the decedent promised to take care of the wages and give them to her when she got old.

Held, under the rule that the subject, the purposes, and the beneficiary of a trust must be clearly ascertained, that the evidence failed to show that a trust was created; and therefore the Statute of Limitations would run against the claim.

Verdict for amount due plaintiff for the last six years allowed to stand.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of assumpsit to recover \$3,720 for work and labor alleged to have been done by plaintiff for the deceased intestate. The bill of particulars claims wages from the year 1858 to 1884, at \$10 per month, said pay having been retained by said Schriever from month to month as the same became due, he agreeing with plaintiff to hold the same in trust for her and subject to her order, and no demand having been made therefor until June 5th, 1885, upon the administrator, who disallowed the same.

The answer is general issue, and the statute of limitations is pleaded.

At the trial the following questions were reserved for the consideration of the full Court.

I. Whether or not the evidence introduced by plaintiffs in

the above case is sufficient in law to establish an express and continuing trust.

II. Whether or not the declarations of intestate to plaintiff or others, made within six years from the time of bringing this action, were sufficient to revive the debt, provided the statute of limitations is held to have run against plaintiff in the first instance.

Under instructions the jury found a special verdict, assessing the amount due for six years last past at \$720, and for the whole period covered by the complaint at \$2,160.

Counsel for plaintiff, Kinney & Peterson, submit the following:

"Express trusts in personal property may be created by parol. Wood on Limitations, Sec. 301; 18 N. Y. 448."

"Express and continuous trusts are not within the statute of limitations. 27 Cal. 275; 16 Cal. 173."

"By the death of Schriever, this trust lapsed into a simple chose in action cognizable by a court of law, and the statute has begun to run against it. 111 Mass. 195; 27 Cal. 275."

"Counsel for defendant admits the above propositions of law, and rests his whole defense on the point that the evidence adduced is not sufficient to prove an express and continuous trust."

"We take it that the case in 18 N. Y., cited above, states correctly the principle governing this case, and we submit that all that can be asked of the evidence is—does it clearly show that the money was left in trust, and are its terms sufficiently clear to enable the Court to execute it?"

"The following language was used by Schriever, as in evidence: 'Schriever said he would take care of my money until I got old, and then he would give it to me. I consented. He always said you will not be *pilikia* about your money, I will take care of it.' During his last sickness he said, 'no trouble about your money, you have got money.' Schriever told Meyer that plaintiff 'has let stand her wages since 1853, and if she lets it go on she will have something to live on.'"

"It would hardly be satisfactory to hold that the evidence was insufficient unless it was shown specially in what respect."

"We have Meyer's statement of Schriever's declarations, which was a clear acknowledgment and recognition of the trust."

"It is not the fault of the Court if our statute of limitations or of frauds is not broad enough. The Legislature can remedy it."

"We submit further that there was an acknowledgment of the debt in Schriever's last illness to plaintiff sufficient to take it out of the statute."

"No such specific promise as claimed by counsel is necessary."

"Any words from which a promise to pay or any acknowledgment of the debt can be inferred, such as the language used, 'There is no *pilikia* about your money, that is all right, you have money,' and 'I'm going down to-morrow morning to put Kamihana's money in the bank and give her the book,' is sufficient to take the case out of the statute. Wood on Limitations, p. 128, and following:"

"It is not necessary that it should be in writing, unless the statute of limitations expressly so states. Wood on Limitations, p. 209 and cases cited."

BY THE COURT.

We think the law is correctly stated by the plaintiff's counsel. An express trust in personal property may be created by parol; and such, if continuing, is not within the statute of limitations.

Our statute of frauds does not contain the seventh section that all declarations or creations of trust or confidence in any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Mr. Perry, in his work on trusts, Sec. 86, says: "Personal chattels are not within the terms of the statute, and trusts in personal property may be declared and proved by parol, though Mr. Eden said that he had not been able to find an instance of a declaration of trust of personal property carried into execution. And certainly the English cases, usually referred to, do not establish the proposition in express terms. There does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner, in the absence of a statute, has entire control of it, and he can sell and transfer it without writing and by parol; there is no reason why he may not transfer it upon

such lawful terms, and to such uses and trusts as he may desire. It has been so ruled in express decisions in the United States."

It now becomes necessary to review the evidence, which, it is claimed, establishes the trust. Plaintiff lived with the deceased intestate for some thirty years, attending to his domestic wants, doing the cooking and washing, and such labor as she was able. She lived in the same house with Schriever, ate from his table, received money from him for her clothes, as she needed it. Schreiver also supported and educated her sons, who bore his name, they in turn doing farm work for him. Now, the plaintiff says she was to receive ten dollars per month as wages, and that Schriever often said, "I will take care of your money, and when you get old I will give it to you. If you take your wages now you will spend it, and it will soon be gone." So far from this proving a declaration that Schriever held this money in trust for plaintiff, a dishonest person, who wished to evade payment of wages to a servant, might use the same language and never intend paying.

It is well settled that "the subject matter of the trust must be clearly ascertained, as well as the purposes of the trust and the persons who are to take the beneficial interests. Loose, vague and indefinite expressions are insufficient to create the trust." Perry, Sec. 86.

In our case, the amount of money, the subject matter of the trust, was not ascertained until the verdict of the jury. There is no evidence that deceased had or kept this money, or any part of it, separate from his own property, or had any fund which he treated as plaintiff's property. The most that can be said in favor of its certainty, is that it was to be ten dollars per month, less such sums as she might draw for her own use. It is evident from the testimony of Meyer that Schriever, in his last illness, wished to make some provision out of his own property for this woman who had been for many years his faithful housekeeper, but mentioned no definite sum of money. He failed, in our view of the testimony, to make such a clear and explicit declaration as would create a trust. We are, therefore, of the opinion that no trust was created, and, therefore, the statute of limitations would run against the claim.

But the verdict may stand for \$720, the amount found by the jury due plaintiff for six years last past. Schriever's declarations to Meyer were sufficient to prove a contract for wages at ten dollars per month.

Judgment accordingly.

Kinney & Peterson, for plaintiff.

P. Neumann, for defendant.

Honolulu, December 14, 1885.

ESTATE OF EMMA KALEILEONALANI, QUEEN
DOWAGER, DECEASED.

EXCEPTIONS FROM RULINGS OF CHIEF JUSTICE JUDD.

OCTOBER TERM, 1885.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Under Section 1196, Civil Code, allowing a mixed jury in civil cases, where one party is a Hawaiian and the other a foreigner; by parties is meant parties of record.

The executor and proponent of Queen Emma's will being a foreigner, and the contestant of the will a Hawaiian; held, that an appeal from the order admitting the will to probate was properly submitted to a jury of six Hawaiians and six foreigners.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THE will of her late Majesty, Emma, was duly propounded for probate by the executor and trustee therein named, Mr. Alex. J. Cartwright. Hearing was had, and the will was admitted to probate. Thereupon, Mr. Albert K. Kunuiakea, cousin and next of kin of deceased, who had contested the will in the Probate Court, appealed to the jury on the principal issue as to whether the will was made while the testatrix was of sound mind. The contestant moved that a Hawaiian jury be empanelled to try the case. This was refused by the Chief Justice who presided, and the case

was tried by a mixed jury of six Hawaiians and six foreigners. To this exception was taken, and the question before the Court is whether such refusal was correct.

The Civil Code, Sec. 1196, prescribes that in all civil cases in which one party is a native Hawaiian and the other a foreigner (alien or naturalized), the jury shall be composed of an equal number of natives and foreigners.

Mr. F. M. Hatch, for the proponent, claims that as the parties of record were Mr. Cartwright, executor and trustee, a foreigner, and Mr. Kunuiakea, heir-at-law, contestant, a native Hawaiian, the case was properly heard by a mixed jury.

Mr. Neumann, for the contestant, claims that the real parties in interest were the legatees (who are mainly Hawaiians), and Mr. Kunuiakea, a native Hawaiian, and therefore a full Hawaiian jury should have been impanelled.

BY THE COURT.

It is not easy to establish a general principle, which would control the character of the jury in every case that might arise. The statute which determines the nature of the jury is peculiar to this country, and we are not aided by precedents from other jurisdictions. The practice of our own Courts at Nisi Prius has not been so uniform as to have much force. The main principle of the statute is that "parties" are to have juries of their own race, dividing litigants into two classes, one of the native Hawaiians, and the other of foreigners (either alien or naturalized).

We think that by parties is meant, parties of record. We cannot undertake in every case to go beyond the record and ascertain who are the parties in interest. This investigation would lead to great complications, and we might find behind a party of record of one nationality, several others who had interests, of whom some were native Hawaiians and others were foreigners. This would necessitate a balancing between them as to whose interest was the greater, in order to give one the share of the jury of the same complexion with himself. The Court ought not to be compelled thus, in advance of a trial, to weigh and determine the importance of the claims of persons who have a possible interest in the result.

In the case before us, the executor is the proponent of the will. He had the affirmative of the issues which were left to the jury, and might be called the plaintiff. It was his duty to propound the will for probate. There are many legacies mentioned in the will. Some are to native Hawaiians, one is to a Chinaman, and to the St. Andrew's School for Girls, and the Queen's Hospital, a chartered institution, a large share of the property is left. The nationality of the contestant entitles him to have six of the jury composed of native Hawaiians. That is all the statute secures to him, and that he has had. So far as the rest of the jury is concerned, it was not incumbent upon the justice presiding to weigh the interests of the Queen's Hospital, the school, the various Hawaiian girls, the Chinese, and other servants of the testatrix, who share in her bounty, parties not represented in Court, and decide at the peril of a new trial, if any error was made, which claim was paramount and should control in the selection of the remaining jurors. It cannot be seriously contended that, the contestant having his six Hawaiian jurors, the Court should select the other six from the foreign and Hawaiian panel proportioned according to the nationality of the various parties interested in sustaining the will. The other party in the case was the executor, the one who moved the will on, a foreigner, and the Court was right in holding that the remaining jurors should be foreigners.

Exceptions overruled.

F. M. Hatch, C. Brown and J. M. Monsarrat, for proponent.

P. Neumann, for contestant.

Honolulu, December 16, 1885.

EKEKELA MALANI *et al* vs. PUHI *et al*.**EXCEPTIONS TO RULINGS OF McCULLY, J.****OCTOBER TERM, 1885.****JUDD, C. J.; McCULLY and PRESTON, JJ.**

Affidavits in support of a motion for new trial, on ground of newly discovered evidence, should show that the evidence is newly discovered, and that due diligence was used to discover it. Such affidavits may be received after the lapse of ten days from verdict, in the discretion of the Court, on proper cause shown. Rule VIII. of the Supreme Court is subject to the control and discretion of the Court.

An affidavit of defendant's attorney, that certain evidence was unknown to defendants, held improper; some reason should be shown for dispensing with the ordinary and proper rule, requiring affidavits of the parties themselves.

An affidavit not entitled in any Court or cause ought not to be received or read.

New trial allowed on another ground.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of ejectment to recover a piece of land awarded to one Nahua by Royal Patent No. 7,739, Mahele Award No. 25, situated in Kaohe IV., Kona Hema, Island of Hawaii, containing 1,185 acres.

The plaintiffs claim that Ekekela is the sole heir at law of the patentee, and as such is entitled to the land.

The case was tried at the last July Term before McCully, J., and a Hawaiian jury, who returned a verdict for the plaintiffs, three dissenting, to which verdict the defendants excepted.

It was admitted at the trial that the plaintiff, Ekekela, was the sole heir at law of the patentee. The defendants relied on the statute of limitations, claiming to have been in adverse possession for more than twenty years.

On the 11th day of July, the defendant moved for judgment *non obstante veredicto*, which motion was denied. Whereupon the defendants filed a motion for a new trial, on the grounds:

First, That the verdict of the jury was contrary to the law and evidence. *Second*, Because the defendants had discovered new and material evidence not known to them before the trial.

This motion was argued on the 1st of August, and on the 6th the Court (McCully, J.) rendered its decision, granting a new trial on the second ground. To which decision the plaintiffs duly excepted, and the bill of exceptions was argued before the full Court at the October Term.

Mr. Kinney, for the plaintiffs, submitted the following points as raised :

1. Is it necessary or not that the affidavits in support of a motion for a new trial, on the ground of newly discovered evidence, should show that the evidence is newly discovered, and that due diligence was made to discover it ?

2. Can affidavits on the above two points be received at all after ten days have elapsed since the verdict, and if so, can they be received twenty-one days after verdict and after the motion has been argued before the trial justice ?

3. If so, are the affidavits in behalf of defendants sufficient on that point, there being no affidavit by the defendants themselves ?

4. If affidavits on behalf of defendants are sufficient, standing alone, to justify a new trial, still, in the light of counter affidavits filed by plaintiffs, should such new trial be granted ?

Many authorities were cited on behalf of the plaintiffs in support of the general propositions advanced in their behalf.

BY THE COURT.

There can be no doubt that the affidavits in support of a motion for a new trial, on the ground of newly discovered evidence, should show that the evidence is newly discovered, and that due diligence was used to discover it. We are also of opinion that such affidavits may be received after the lapse of ten days from verdict.

The rule of Court VIII., which provides that "motions for a new trial, on account of misconduct of the jury, for newly discovered evidence, * * * must be made in writing, and filed

with the Clerk within ten days after the verdict," is a rule made by the Court with a view to the interpretation of the practice of the Courts, and is subject to the control and discretion of the Court, and therefore the Court, in its discretion and on proper cause shown, and to prevent an injustice being done, will interfere and let the parties in, but each case must stand on its own merits.

See *Rex vs. Holt*, 53 L. T. R. N. S. 436; *Pritchard vs. Pritchard*, 51 L. T. R. N. S. 859.

We thus dispose of the two first points made on behalf of the plaintiffs.

By the bill of exceptions the right to except to the admissibility of any or all of the affidavits on the hearing, was reserved to either party, and counsel for the plaintiffs argued very fully and, as we think, correctly against their admissibility, and more especially with regard to the affidavit of Mr. Thurston, wherein he states that the evidence of Hanewa, Helene and Kalaaaukane (the witnesses whose evidence is said to be newly discovered), was unknown to the defendants or defendants' counsel at the time of the trial, and was not accessible to the defendants by the exercise of due diligence.

We cannot see how such an affidavit could properly be made; the deponent could not possibly have known what information the defendants had, and though in some cases affidavits of the parties themselves might be dispensed with, still some reason should be shown for dispensing with the ordinary and proper rule.

Another matter which renders this affidavit and all others filed on behalf of the defendants inadmissible, although the point was not mentioned either on hearing the original motion or on the appeal, is that they are not entitled in any Court, or, except Mr. Thurston's, in any cause, and therefore ought not to have been received or read, and we trust that such irregularities may not again occur.

For the foregoing reasons we are of opinion that the exceptions, so far as regards the granting of the new trial on the ground of the discovery of new evidence, should prevail. But on a consideration of the evidence given at the trial, we are of opinion

that the jury took an erroneous view of its effect, and therefore think that, in order that substantial justice may be done to the defendants, the case should be sent to another jury.

The defendants must pay the costs of the motion in the Court below and of this appeal, the costs of the former trial to abide the event.

A new trial is therefore ordered.

Kinney & Peterson, for plaintiffs.

L. A. Thurston and J. M. Monsarrat, for defendants.

Honolulu, December 18, 1885.

W. H. RICKARD vs. ANTONIO DO COUTO.

APPEAL FROM DISTRICT COURT OF HAMAKUA, HAWAII.

OCTOBER TERM, 1885.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

A labor contract read that the laborer was to work for the term of three years from the date of the commencement of the service; held that this meant three calendar years, notwithstanding that the contract, in another section, provided that wages were to be paid for each month of twenty-six days' service.

If the laborer is unable to work from illness, he cannot be compelled to make up the time thus lost, and if he is willfully absent from work, and agrees orally that the lost time charged to him by the master is correct, yet he cannot be compelled to work out the time thus lost, unless the master obtains the adjudication of a Court, under Sections 1419, 1420, Compiled Laws.

Wood vs. Hookina, 3 Haw. 102, and *Wood vs. Afo*, 3 Haw. 448, distinguished from the case at bar.

Judgment of lower Court reversed.

OPINION OF THE COURT, PER JUDD, C. J.

It is agreed that the following are the essential facts of this case :

“That said defendant came to this country under a contract

with the Board of Immigration, by which he agreed to work under the direction of said Board for the term of three years, counting from the time of his arrival and commencement of service. The defendant was directed to work, by said Board, for the plaintiff. That said service began September 9, A. D., 1882. That after the 9th day of September, A. D., 1885, defendant stopped working, and plaintiff claimed that defendant was bound to make up eighty-nine and one-fourth days, which it is agreed were not worked, out of the twenty-six working days of each month during said term."

The opinion of the Court is asked on the following questions of law :

1. Can the defendant be now compelled to make up the number of days which he failed to work, if such failure was willful on his part, and without legal excuse, and if the number of days lost during each month was regularly made up at the end of each month, and agreed to by defendant as correct in number.

2. Can defendant be compelled to make up time lost on account of his sickness?

3. Can defendant be compelled to make up legal holidays, occurring during the twenty-six working days of each month?

4. Can the defendant be compelled, under the contract, to complete nine hundred and thirty-six days' work after the expiration of three years, no reason being assigned by employer or employee for the failure to work eighty-nine and one-fourth days, and defendant having, during the three years, regularly tendered his work, except on the days missed?

5. Does the contract, by its terms, call for nine hundred and thirty-six days' work, or does it end at the lapse of three years from its commencement if no desertion has taken place?

The contract which we are to construe is as follows :

"This agreement, entered into this ——— day of ——— in the year of our Lord ———, by and between Augusto da Silva Moreira, single, of age, agent, Portuguese, resident of this city, acting duly authorised by Abraham Hoffnung, married, of age, English, merchant, living in the city of London, as agent for the Board of Immigration, a Bureau of the Government of the Kingdom of Hawaii, in the Island of St. Michaels, Azores, as shown by orig-

inal power of attorney, of the first part, and the party whose name is hereto subscribed, of the second part.

Witnesseth, That whereas the party of the second part is desirous of emigrating to the Hawaiian Islands, there to be employed as an agricultural laborer, under the direction of the said Board of Immigration: Now, therefore, in consideration of a passage to the Hawaiian Islands, on board the steamship Hansa, and a further undertaking by the party of the first part that the said Board of Immigration will pay, or cause to be paid, to the party of the second part, wages at the rate of nine dollars per month, with board and lodging for himself and children under twelve years of age, for each and every month of twenty-six days' service, faithfully performed, during the existence of this agreement (a day's service to be ten hours in the field and twelve hours in the sugar house); such wages to be paid at the end of each calendar month, reckoning from the date of the commencement of such service after arrival at Honolulu. And in consideration of a further undertaking on the part of the party of the first part, to secure the party of the second part full protection under the Hawaiian law, as fully as the same is enjoyed by the native born subjects of the Kingdom, and likewise, in case of sickness, that he shall be supplied with proper medical attendance, and that the said children shall be properly instructed in the public schools, the said party of the second part will duly and faithfully perform such lawful and proper labor as he may be directed to perform under the auspices of the said Board of Immigration, for the term of three years, counting from the day on which he shall commence such service, after arrival in the Kingdom of Hawaii, it being always understood that the contracted party shall not work on Sundays nor on any holiday recognized by the Government, and that his services shall not be transferred without his consent; and the party of the first part, in consideration of the agreement hereinbefore expressed, as being entered into by the party of the second part, hereby agrees to the same, and undertakes that the said Board of Immigration will pay, or cause to be paid, the wages hereinbefore set forth, and will keep and perform, or cause to be kept and performed, all the other stipulations hereinbefore set forth. In testimony whereof, etc."

BY THE COURT.

What is the term of service for which the laborer engaged under this contract? Is it for three years, *i. e.*, from 9th of September, 1882, to 9th of September, 1885? or is it for thirty-six months of twenty-six days each, in all nine hundred and thirty-six days? We think that the language of the contract sufficiently answers this question. The printed translation of the contract reads that "the said party of the second part will duly and faithfully perform such lawful and proper labor as he may be directed to perform, under the auspices of the Board of Immigration for and during the space of three years next succeeding the date of the commencement of such service after arrival in the Hawaiian Kingdom." Another and more literal translation of this part of the contract appears in the copy quoted in full in the earlier part of this decision. The term of this contract then is three years, commencing from the day on which the laborer begins to work. The time when this contract ends is made certain by the statement when the term is to begin. Three years from a given date would expire when three calendar years have elapsed since this date. This is the rule for the construction of leases and all other contracts, and we see no reason why it should not apply to a labor contract. If the laborer agreed to labor during all the time covered by a term of three years, no time being stated when the labor was to begin, and it appearing by the whole agreement that the contract was for the performance of three years of labor of 312 days each, without reference to the time over which this labor was to be spread, our decision might be different. But here the laborer has not so agreed in terms. He agrees to labor on such working days as will occur during the three calendar years succeeding a date capable of being made certain, *i. e.*, the day of his beginning his service.

Much stress is laid in argument upon the clause that the Board of Immigration contracts "to pay wages at the rate of nine dollars per month with board and lodging for himself and children under twelve years of age, for each and every month of twenty-six days' service faithfully performed during the existence of this agreement." It is to be noticed, that this language (every month of twenty-six days of faithful service) is descriptive of the

term for which nine dollars of wages is to be paid by the employer, and is not repeated in the description of the term of service contracted for by the laborer. The contract further says, "such wages to be paid at the end of each calendar month reckoning from the date of the commencement of such service after arrival in Honolulu." We take it to mean that there shall be at the end of each calendar month a settlement made with each laborer. Payment of wages is not to be postponed. Wages, however small in amount, are not to be suffered to be in arrears; and in reckoning the amount of such wages to be thus paid monthly, twenty-six days of labor is to be compensated with nine dollars, and any less number of days with a proportionately less amount of money. This secures to the laborer twelve stated times per annum when his employer must settle with him and pay him whatever wages may be due. We think it would be unwarrantable to transfer the language employed for the sole purpose of making clear the amount of wages to be paid, and the times of payment, to another part of the contract, in order to define the quantum of labor which the employee is to fulfill.

It is argued that as each year consists of three hundred and sixty-five days, from which deduct fifty-two Sundays, 313 days of work remain upon which the laborer agrees to work, and therefore a year's work will not be fulfilled unless 313 days of actual labor have been executed. But a day is but a subdivision of time, and it could be argued with equal cogency that as each day consists of say ten working hours, therefore a day's work would not be performed if only nine and a half hours' work was fulfilled. An hour might be still further subdivided into minutes and seconds, and each delinquency tacked on to the term. But we do not think that any such detailed account of time was contemplated by the contract. The laborer is bound by this contract to present himself, ready to perform such labor as he may be directed, during twenty-six working days of each month, and to work ten hours a day in the field, and if in the mill twelve hours, to entitle him to the full wages of nine dollars, unless prevented by sickness or other valid excuses. We think that it was contemplated when the contract was made that the laborer, as a human being, might be ill at some time during the continuance

of the contract. The employer engages "to supply him with proper medical attendance in case of sickness." It seems to be conceded that the laborer is to be lodged and fed during sickness. Whether wages are to be paid to him during sickness is not raised in this case. But as the laborer can only receive nine dollars when twenty-six days of labor have been performed, we presume that he could not claim wages while unable to work on account of sickness. But, as we have above said, when the calendar years have expired which end the term contracted for, the days lost through sickness cannot be tacked on to the term to be worked out thereafter. Cases of hardship might occur to the employer as when, as suggested by counsel for plaintiff, a man might contract for one year's service upon an agreement in form similar to the one we are considering, and be ill eleven and a half months. But it would be a case of greater hardship to the laborer, if, after such a long illness, he would have to work an additional year after his contract had expired. So also Sundays and holidays recognized by the Government, upon which days the laborer is specially exempted from labor, and consequently for which he receives no wages, are not to be taken account of and added to the term of three years, and afterwards discharged in labor. If this could be done, the privilege of not working on those special days would amount to nothing to the laborer, and, so far as he was concerned, it would be valueless to have this exemption mentioned in the contract, for Sundays and Government holidays stand in this contract on the same footing; and if the laborer can be required to make up the days of labor lost to the employer by Sundays and holidays, it would be no privilege to the laborer.

This leads us to the last point to be considered, namely, the penal remedies which the employer has under our laws against the laborer. By the labor laws as they now exist, Sec. 1,419, Compiled Laws, if the person bound to service willfully absents himself from such service without leave from his master, he may be apprehended by the warrant of a police or district justice and restored to his master, and compelled to serve the remainder of the time for which he originally contracted. By the original law (1859) the laborer could be compelled to serve not to exceed

double the time of his absence. The Act of 1882 only authorizes a sentence to make up the time lost by the absence of the laborer. By Sec. 1,420, if the person bound to service refuses to serve when ordered by the magistrate to do so, or refuses to work according to his contract, he may be committed to prison to remain at hard labor until he consents to serve according to law. If he, after having returned to service pursuant to a magistrate's order, again willfully absents himself without leave, he is liable to a fine not to exceed \$5 for the first offense, and not to exceed \$10 for every subsequent offense. A willful absence, we suppose, is one without sufficient legal excuse. Now if the laborer is unable, from illness, to present himself for work, or if though present at the place of labor he is, from illness, unable to work, he is not derelict, his absence from work is not willful, and he cannot be compelled to make up the time of absence to his master. If the weather be such that it would be detrimental to the health of the laborer to work out of doors, or so that it would not be profitable to the master to proceed with out-door work, his absence from work would not be willful, and though he receives no pay for the days thus lost, he cannot be compelled by the judgment of a magistrate to make up this time.

But the case is put to us of a willful absence from work without leave of the master, for which no arrest is made, and no adjudication of a magistrate obtained; but the servant agrees that his absence was without legal excuse, and the number of days so lost in each month is regularly entered up at the end of each month and agreed orally by the servant as correct. The agreement to make up this lost time is implied, we presume, from the laborer's assent that the number of days lost is correct in number. Can this agreement be enforced? We think not. It is a new agreement. It is not in writing, and does not conform to the statute in other respects. By virtue of this new oral agreement to make up lost time the servant is not compellable by the magistrate to serve. The written contract before us does not contain such a stipulation. His liability to service must flow, if at all, from the original contract. We are of the opinion that if a laborer who has absented himself from work willfully and without leave returns

again to his master's service, and no notice is taken of it, and the master does not obtain an adjudication that the absence was without legal excuse and a sentence that the lost time must be worked out, he cannot, after the contract has expired, compel the laborer to work out such arrears. The master must be considered in law as having waived the absences.

It becomes necessary to review former decisions of this Court which are cited by plaintiff's counsel as decisive of this case. These are *Wood vs. Hookina*, 3 Hawn. 102 (1869); *Wood vs. Afo*, 3 Hawn. 448 (1873). In the first case the master claimed that a judgment to the effect that the servant should work eight months penal time was not satisfied by the servant continuing in his master's service for eight months, he having worked only 115 days during this period, and not the full score of 208 days. But the case was decided against the master on the ground that he had on his part failed to fulfill the contract as to payment of wages. Remarks of the majority of the Court that the judgment was not illegal, though it imposed a term of service beyond one year after the end of the original term of service, were not necessary to the decision of the case, and must be treated as *obiter dicta*.

The second case. Here the servant had contracted to serve five years, but, when about half the time had expired, he was sentenced for a crime to be imprisoned at hard labor for five years. This sentence he had served, and his master claimed his services for the remainder of the original term of the contract under the law as it then stood which authorized a magistrate, if the person bound to service had willfully absented himself from such service, to impose an additional term of labor not exceeding double the time of absence, but such additional term of service shall not extend beyond one year after the original term of service. The majority of the Court held that the lapse of time during the imprisonment was not a bar to the penal enforcement of the contract if it result from the servant's own act. Much of the reasoning of the majority of the Court is against the view taken by us in the case before us. But that case was upon the construction of a statute now repealed, the latter part of Sec. 1,419 of the Civil Code, which authorized the imposing of an additional term of service in case the original term had not been fulfilled by the ser-

vant. That question does not arise in the case before us. Here we are to construe the contract itself, not the statute which is invoked in its aid.

The judgment of the lower Court ordering the defendant back to plaintiff's service is reversed, and judgment is now ordered for the defendant.

F. M. Hatch, for plaintiff.

P. Neumann, for defendant.

Honolulu, December 24, 1885.

W. C. PARKE, *et al.* Assignees of Aiau, vs. LAU NG.

APPEAL FROM DECISION OF McCULLY, J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

A conveyance made in May, 1884, by a party who was declared a bankrupt in February, 1885, held to be in fraud of creditors, and set aside, there being strong evidence that the grantee was aware of the insolvency of the grantor at the date of the conveyance.

Decree affirmed.

OPINION OF THE FULL COURT.

We have carefully reviewed the testimony in this case, and are of the opinion that the judgment and decree of Mr. Justice McCully, appealed from, should be sustained.

We think it proper to refer to the admission of defendant that he knew of the debt of Aiau to W. P. Akau, and of the mortgage to secure it, at the time he took the deed in question. As this mortgage was given for a debt overdue, and expressly stated in the mortgage to be in consideration of the forbearance of the company, which W. P. Akau represented, to demand and sue

Aiau for the debt, it furnishes strong evidence that defendant was aware of the insolvency of Aiau at that time.

The decree is affirmed with costs.

W. A. Whiting, for plaintiffs.

W. R. Castle and *H. E. Avery*, for defendant.

Honolulu, January 23, 1886.

DECISION OF McCULLY, J., APPEALED FROM.

This is a bill in equity relating to the conveyance of certain leasehold properties by Aiau to the defendant, which is alleged to be in fraud of creditors.

The conveyance was made May 16, 1884. Aiau went into bankruptcy February 20, 1885, and has since deceased. The defendant was his brother. It is to be determined whether the transaction is fraudulent and void, within the terms of Section 978 of the Civil Code, as amended in 1882: "Every assignment, conveyance or transfer of his property by him, after he shall have become insolvent or committed an act of bankruptcy, except upon (1) a good consideration (2) to a bona fide purchaser, (3) having no reasonable cause to believe him to be insolvent or bankrupt, shall be void."

Our leading Hawaiian case upon the statute then existing, in the same words as the above, except in the third particular, which provided for "notice" of the insolvency, instead of "reasonable cause to believe," is *Fallon vs. Robinson*, 2 Haw. 227. The question in that case was the validity of a mortgage made nine days before Turton was declared bankrupt. Respecting the terms *failure*, *bankrupt* and *insolvent*, the Court say: "Whenever any person owing debts to the amount of \$2,000 shall refuse or fail to make payment of his just demands for ten days after the same shall have matured and been presented for payment to him or to his agent, he has *failed*, within the meaning of the bankrupt law, so that he may, upon petition, be declared bankrupt. If his failure results from his not having the means to pay his debts, he is then *insolvent*, but not bankrupt until so declared by competent authority. A person may be insolvent for any length of time and yet not bankrupt,

within the meaning of the statute, and so a person may be declared bankrupt who is not, in fact, insolvent."

To invalidate this deed it must first appear that Aiau was, on the 16th of May, 1884, "insolvent," that is, not having the means to pay his debts. On the 20th of February, 1885, when he was adjudged a bankrupt, it appears by the schedules of his assets and liabilities that he was also insolvent. His whole estate will not solve his debts. Was he insolvent May 16th, nine months previously? The evidence offered on this point is, first, a statement made up from the books of Aiau by a Chinese accountant and translated by the Court interpreter, as of May 16th, by which his assets are made \$7,445, plus \$3,159 of poor accounts, as per a statement of Aiau's without particulars. The evidence of C. Monting, afterwards given, shows that his debts were practically worth nothing. Out of \$2,000 he was able to collect not a dollar. His liabilities are stated at \$23,802. The real estate does not appear in the statement from the books. Mr. Castle testifies that there was a mortgage due of \$10,000 on his rice plantation. The plantation sold for \$14,000 by the mortgagee after entry.

The assignment of the leaseholds, which is the deed under consideration, is for \$700, recited to be an indebtedness of the grantor to the grantee, and \$1,050 in cash. They are subject to mortgage. The defendant claims that what is paid is a full consideration. So, taking the excess of the value of the several properties of Aiau above mortgages, and adding to the assets, as per the books, there is left yet a clear insufficiency or insolvency. There also arises an inference from the condition of his affairs nine months later, unless explained by proofs of recent losses, that the insolvent condition preceded the 16th of May.

The testimony of Lu Chong, of the firm of Wing Wo Tai, that in dealing with Aiau his accounts were increasingly difficult of collection, and were not paid up, is confirmatory of the allegation of insolvency, though I would not find this as a fact solely on evidence of a slowness to pay debts. On the whole testimony, I find that Aiau was insolvent at the date of the execution of the deed.

Respecting defendant's reason to believe that he was dealing with an insolvent, the circumstance that he was his brother goes

for something; but it is more important that he was in his employ as manager of Aiau's rice plantation for seven years prior to the sale of it by the mortgagee.

Lu Chong gives circumstantial accounts of conversations with defendant at Aiau's place of business, in trying to make collections, in which defendant said that times were hard; that Aiau had incurred large expenses in maintaining a polygamous family, and that he had no money. Defendant denies the conversation. The testimony of Lu Chong seems to me to be preferred in this conflict. I do not regard the circumstance of the alleged balance of wages due defendant, accumulated in Aiau's hands, as of itself significant.

But in view of the business connection and his opportunities for knowing the condition of Aiau's affairs, I think the defendant is chargeable with knowledge.

The circumstances of the sale, as testified by Mr. Ward, the solicitor who drew the conveyance, give me an impression that the parties were making a case. They made some ostentation of bringing a bag of coin, which they said contained \$1,050, and which the defendant held up, saying it was all right, but declined Mr. Ward's suggestion that it be counted and delivered. No entry can be found in Aiau's books to the amount said to be due the defendant.

Thus upon every ground I find the conveyance in question to be in fraud of creditors, and therefore void.

I will sign a decree in accordance with this result.

W. A. Whiting, for plaintiffs.

W. R. Castle, for defendants.

Honolulu, November 18, 1885.

WAILEHUA vs. LIO.

APPEAL FROM DECISION OF McCULLY, J.

JANUARY TERM, 1886.

JUDD, C. J. ; McCULLY AND PRESTON, JJ.

Where there is a conveyance to husband and wife: on the death of the wife, the entire estate vests in the husband.

Paahana vs. Bila, 3 Haw., 725, approved.

The title of tenants in common must be conceded and at rest between them, or the Court has no jurisdiction to partition the estate.

OPINION OF THE COURT, BY JUDD, C. J.

This is a bill for partition of certain real estate granted to one Nalaweha by Royal Patent No. 1512.

The bill alleges that the premises were conveyed by Puuheana, the widow of said Nalaweha, to defendant, Lio, and Kamakaluhi, his wife, and claims that Kamakaluhi having died intestate, in 1883, her estate in the land descended one-half to her father, the plaintiff, Wailehua, and one-half to her husband, Lio.

The defendant demurs, on the ground that as the conveyance from Puuheana was to Lio and Kamakaluhi, who were husband and wife, on the death of Kamakaluhi the entire estate vested in Lio, the survivor.

This principle, controlling conveyances to husband and wife, was settled by this Court in the case of *Paahana vs. Bila*, 3 Haw. 725 (1876). We see no reason for reversing it now.

Moreover, the title of the plaintiff being disputed to this land, it is not a proper subject of partition. The title of the tenants in common must be conceded and be at rest between them, or the Court has no jurisdiction to proceed to partition the estate. It would have been competent for defendant to have answered that the title of plaintiff was disputed, and this would have warranted the Court's dismissal of the bill without further discussion.

The bill is dismissed.

M. Thompson, for plaintiff.

W. R. Castle and *H. E. Avery*, for defendant.

Honolulu, January 23, 1886.

P. K. HIPA vs. G. H. LUCE, Tax Collector.**MANDAMUS.****JANUARY TERM, 1886.****JUDD, C. J. ; McCULLY and PRESTON, JJ.**

Plaintiff, being exempt from personal taxes by reason of his membership in a military company, demanded of the defendant, as Tax Collector, a certificate bearing the words "qualified to vote," without which his vote at election for members of the Legislature would not be received; defendant's answer was that, in accordance with custom, he had given the certificate, with those of the other members of the company, to the captain thereof.

On a petition for a writ of mandamus against the Tax Collector, held that plaintiff was entitled to personally receive his certificate, and that the Tax Collector, having made the captain of the company his agent to deliver the certificate, was responsible for his neglect.

Writ issued.

THIS is a petition for a writ of mandamus. It alleges as follows:

"1. That he (petitioner) is a member of the volunteer military company or organization known as 'The Queen's Own,' and was a member of said company on July 1st, 1885.

"2. That he is of legal age, and entitled to vote for representatives in the Legislative Assembly of the Kingdom, and that, by reason of his membership of the said volunteer military organization or company, he is by law exempt from the personal taxes assessed by the Government.

"3. That he is entitled to a certificate from the above-named George H. Luce, Tax Collector of Honolulu, in the nature of a receipt for personal taxes, bearing the words 'Kupono i ke koho balota,' or 'Qualified to vote.'

"4. That the fact of petitioner's membership of said 'Queen's Own' military organization is well known to the said George H. Luce, Tax Collector as aforesaid; that he has requested the said G. H. Luce to issue to him (your petitioner) the said certificate in

the nature of a receipt for personal taxes as aforesaid, and that the said George H. Luce, Tax Collector, wholly refused and neglected, and still refuses and neglects to deliver the same unto your petitioner, contrary to the laws of this Kingdom and in violation of the duties of his office as such Tax Collector.

“Wherefore, the premises considered, your petitioner humbly prays that an order or writ of mandamus be issued out of and by this Honorable Court to the said George H. Luce, Tax Collector of Honolulu, by which he shall be directed to deliver unto your petitioner the certificate in the nature of a receipt for his personal taxes for the year 1885, bearing the words ‘Kupono i ke koho balota,’ or ‘Qualified to vote.’ That the said George H. Luce be adjudged to pay all costs herein.

“And petitioner will ever humbly pray.”

The answer of the respondent is as follows :

“Now comes George H. Luce, respondent herein, and making return to the writ of mandate heretofore issued by this Honorable Court in this matter, respectfully shows : That the respondent is the Tax Collector for the District of Honolulu : That heretofore, to wit, on or about the first day of November, respondent received from the tax assessors of the aforesaid district a list of names of persons who were by law exempt from paying taxes, and therefore made out and signed tax receipts for the persons in said list named :

“That the persons so named in said list, respondent is informed and believes, were members of various fire companies and military companies in Honolulu, and were and are personally unknown to respondent :

That therefore, and in accordance with the usage and custom heretofore existing, and for the purpose of preventing persons who were not entitled thereto from obtaining any of said certificates, and for the purpose of delivering them to those who were thereto entitled, said certificates were delivered to the foreman of said fire companies, and to the captains of the said military companies respectively, for distribution to the members of the same :

“That among other certificates, that of P. K. Hipa, the peti-

tioner herein, was delivered to one W. F. O'Connor, captain of the 'Queen's Own' company (the company mentioned in the said Hipa's petition); that on yesterday, the 22d day of January, 1886, the petitioner demanded of respondent his certificate, and was informed by respondent that the same had been delivered to the captain of his company to be handed to him, and would be given to him on application to said captain. That having issued said certificate as aforesaid, the respondent believed, and now believes, that he was and is not authorized to issue another certificate for the same person without any proof being made of the loss of the original certificate."

OPINION BY JUDD, C. J.

In order to entitle a petitioner to a writ of mandamus, it must appear that the respondent is clothed with some legal duty. The object of the writ now sued for is to obtain a tax receipt impressed with the words "Qualified to vote," the production of which at the polls at the coming general election for representatives of the people is one of the essentials to enable the petitioner to cast his vote. Section 10 of the Act of 1868 (Compiled Laws, p. 224-5) clothes this respondent, as Tax Collector for the District of Honolulu, with the duty of filling out and delivering to every person entitled to vote a tax receipt so impressed. The qualifications of the petitioner to vote are not questioned by the answer. But the respondent avers that he has made out and delivered the petitioner's tax receipt to the commanding officer of the volunteer corps, "The Queen's Own," of which petitioner is an enrolled member. Is this a discharge of his duty in this respect? I think not. From the tenor of the answer it would appear that for convenience, or to ensure identification of the individuals in the volunteer corps, the respondent made the captain of the corps his agent to deliver the receipt to petitioner. This the agent has not done, though the receipt was filled out ready for delivery on or soon after the first day of November last. The principal is responsible for the acts of his agent, and is answerable for his neglect to deliver the receipt. He cannot in this way evade the express duty which the law explicitly casts upon him, and upon him alone. The agent is presumably under the control of his

principal, and I cannot anticipate that respondent will have any difficulty in revoking the agency and recovering the receipt.

I deem the cause shown to be insufficient, and think that a peremptory mandate should issue to the respondent that he deliver the tax receipt in question to petitioner on or before 12 o'clock m. on Tuesday, the 26th instant, and pay the costs of these proceedings.

• CONCURRING OPINION OF McCULLY, J.

Everything governing the decision of this case is to be found plainly expressed in our statutes.

By Section 10 of the Act of 1868, regulating "Qualifications of Electors," found at page 222 of the Compiled Laws, it is made the duty of every tax collector, upon receiving the payment of the taxes from any person who is qualified to vote, to fill out and deliver to every such person a tax receipt bearing the words "Qualified to vote."

The petitioner, as a volunteer soldier, actually enrolled and doing duty, is exempt from the payment of one description of taxes, viz., personal taxes, by Section 67 of the Tax Law, page 131, Compiled Laws. This exemption must be taken as a privilege in respect to the liability of payment in consideration of certain gratuitous public service, and therefore it is not to be held that it is accompanied by disfranchisement in the cases where the party has no property tax to pay, and so obtains no receipt for the payment of taxes. The statute provides for a sworn list to be presented to the assessor by the commanding officers of the companies of the persons entitled to such exemption. Then, in words of the statute first cited, the tax collector must deliver to every such person one of the tax receipts so impressed.

The return of the respondent, which is not traversed, is that he has issued such tax receipt, delivering it with those belonging to the other members of the company to the captain. It is plain that this is not the delivery required by the statute, which is a delivery *singulariter*, to "every such person," to each person man by man. The return states that the delivery in a block was made for convenience, and in accordance with previous usage. Certainly neither of these affect the force of the statute. It must

be considered that the tax collector made the company captain his agent. He is not exempted from any responsibility or liability by delegation of his duty to another. He is by the law to deliver the certificate to the person entitled to the franchise.

I concur in the order made by the Court.

CONCURRING OPINION OF PRESTON, J.

It is conceded by the return to the writ of mandamus that the applicant is an elector, and entitled to vote at elections for representatives to the Legislative Assembly. The tax collector says he has given the applicant's certificate to the captain of the "Queen's Own," the corps of which the applicant is a member. And it is contended by the Attorney-General on behalf of the respondent that this is according to usage and a compliance with the law.

I cannot agree with this contention. The law casts the duty upon the tax collector to give the certificate to the voter entitled thereto, and it seems to me the respondent cannot relieve himself of the responsibility by delivering the certificate to a third person. If he does so deliver it, I agree that such person is the respondent's agent, and that he has control over such agent. If it be true that the respondent does not know the elector personally, it is his duty to take proper means to have him identified and then deliver to him the certificate.

The question as to how the respondent is to obtain the certificate is not for this Court to consider; he must deliver a certificate to the applicant according to law.

I therefore agree with the Chief Justice and my brother McCully, that a peremptory writ of mandamus should issue.

W. R. Castle, for applicant.

P. Neumann, Attorney-General, for respondent.

Honolulu, January 25, 1886.

KELA (w) *et al.* vs. PAHUILIMA.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

Defendant bought land from one in possession, but the grantor had no title; subsequently plaintiffs acquired title by inheritance and purchase; defendant, having built a house on the land, claimed an equitable estoppel in his favor against plaintiffs.

Held, that defendant acquired no title by the deed from his vendor, and that the plea of estoppel failed entirely.

Plaintiffs' delay in claiming their rights held not to amount to laches, the statute of limitations not having fully run.

Kamohai vs. Kahele, 3 Haw. 533, distinguished.
Exceptions overruled.

OPINION OF THE COURT, BY McCULLY, J.

Action of ejectment tried at the last October Term.

The defendant excepts to the refusal of the Court to give the following instruction:

(1.) If the jury find that the plaintiffs, by their silence in regard to their rights in the land, allowed or led the defendant into dealing with the apparent owner, Pahuai, improving the land with his (Pahuai's) consent, and finally acquiring a supposed title therein by purchase, the defendant's title therein is secure.

(2.) If a person having a claim in premises that are in possession of another, under license of a third party, supposed by the one in possession to have a good title, sees the one in possession making valuable improvements, without protest or any kind of notice or objection, and the other goes on making improvements, and finally purchases the premises from the third party, the claimant is estopped.

The state of facts, so far as is necessary to be known, as gathered from the evidence sent up with the bill of exceptions, is as follows: Kauakahi, the patentee of the premises in question,

died in 1867, leaving a son and only child named Poeakua, who remained on the premises, and died, between six and nine years ago, intestate and without issue. One Pahuai, who had land adjoining, would seem to have had some use and occupation of these premises. (There is testimony that Kauakahi had executed a will in which Pahuai was made the devisee of one-half his land, but that this will was by chance partly burnt, and was refused probate when offered to the Probate Court.) Pahuilima, the defendant, testifies for himself, saying: "Pahuai and I have been in possession of the land since Kauakahi's death, except of the part occupied by his widow. Pahuai held the land under a will of Kauakahi, and gave Kipola the eastern part and one *loi*, and him the rest. The will was never proved. It was burnt, with the exception of a portion, before Kauakahi died. I took a bill of sale of the land from Pahuai in 1880, paying \$5 for it. In 1870 I built a house on the land, with Pahuai's consent. I built the house because Pahuai said the land would go to my wife, who was his grandchild. This house cost about \$200, beside the carpenter work, which I did myself. In 1882 I placed another house on the land. Bought the house for \$80. It cost about \$25 to haul it and \$25 to fix it up. I know the plaintiffs. I came from Waimea in 1859, and married my wife the same year. The plaintiffs were then living at Waialua, where I was teaching school, and have been ever since. I often have seen them passing along the road at Waipouli, in front of the disputed premises. Previous to probate proceedings, the plaintiffs never made any claim, so far as I know, on Pahuai for any interest in the land; they made none on me. They made no protest or objection to the houses I placed on the land, nor informed me that they had any interest in the land."

The plaintiff, on the death of the son of the patentee, without issue, became a collateral heir to a small share, and has purchased sundry other shares. She does not claim the whole property. The verdict of the jury in her favor is for two-thirds, reserving the right to the defendant to move off the house which he moved on to the premises.

The sole question is, whether, under these circumstances, the plaintiff is estopped from setting up her legal title.

The defendant's counsel cites from Bigelow on Estoppel, 479, *et seq.*; Story's Eq. Jur., § 1520; *Kalaeokekoi vs. Kahele*, 5 Hawn., 47; *Kamohai vs. Kahele*, 3 Hawn., 533; 2 Pom. Eq. Jur., §§ 808, 809, 812, 818, 821.

The plaintiff's counsel cites Wood on Limitation of Actions, p. 126; 2 Pom. Eq. Jur., §§ 806, 807, *et seq.*; *Boggs vs. Merced Mining Co.*, 14 Cal. 279.

In part, it is seen, they refer to the same authorities, and on the whole we find no inconsistency in the result.

The doctrine of equitable estoppel, in respect to land title, is thus stated by Mr. Justice Field in *Boggs vs. Merced Mining Co.*, 14 Cal., and cited, with other cases, in 2 Pomero's Equity Jurisprudence, 269. "In order to estop a party, by his conduct, admissions or declarations, the following are essential requisites: It must appear (1) that the party making his admission by his declaration or conduct, was apprised of the true state of his own title. (2) That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud. (3) That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge. (4) That he relied directly upon such admissions, and will be injured by allowing the truth to be disproved."

Take this citation from the brief for defendant. Bigelow on Estoppel, 479, defines estoppel generally: "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position; the former is concluded from averring against the latter a different state of things as existing at the same time."

The counsel for the defendant in this case seems to assume that the defendant, in buying from another occupant of these premises, in a measure built up some title better than he had bought, and if he "supposed" he was buying something, he must be considered to have contributed some validity to that which was of no value in the hands of the first party. This is opposed to the principles that no one can give a title which he does not possess,

and that a purchaser is bound to examine the title, and gains nothing by buying in willful ignorance.

Comparing the facts given even in the defendant's testimony with the law, as cited above, the plea of equitable estoppel fails entirely. The defendant had every opportunity to know that Pahuai, of whom he bought, had no title to the land. The plaintiff does not appear to have done anything to induce him to act on a different state of things, and the delay of plaintiff to claim her rights does not in this case seem to amount to laches beyond what is allowed by the jury in their verdict giving defendant the right to remove the house built on the land since the plaintiff's title accrued, and personally with her knowledge of the trespass.

In *Kamohai vs. Kaele*, the substantial issue before the Court was as to a certain royal land patent being fraudulent, and the remark that, under the circumstances of that case, the plaintiff was in any view of the facts chargeable with laches, recognized the doctrine that where the party prosecuting an equitable title is shown to have been guilty of gross laches in prosecuting it, and long and unreasonable acquiescence in the assertion of adverse rights, he would be barred in equity, although the statute of limitations barring the assertion of a legal title had not fully run. In this the Court followed *Kalakaua vs. Kearweamahi*, 4 Haw. 577.

But this doctrine does not apply to the case at bar, in which the holder of the legal title is sought to be estopped by his mere acquiescence in the adverse rights of the defendants, the statute of limitations not having barred him. No other ingredient of an estoppel is shown.

The case before us presents a very common state of facts among Hawaiians. When the owner of property dies, and the little estate remains for years in possession of some friend who may have lived with him on the land, without claim by the collateral heirs, something more than this is required to estop the rights of parties under statute of limitations.

The exceptions are overruled.

Kinney & Peterson, for plaintiffs.

S. B. Dole, for defendant.

Honolulu, January 28, 1886.

HAWAIIAN COMMERCIAL AND SUGAR CO. *vs.* J. M. HORNER.**EXCEPTIONS TO RULINGS OF JUDD, C. J.****JANUARY TERM, 1886.****JUDD, C. J. ; McCULLY and PRESTON, JJ.**

To justify the presiding judge at a trial in directing a verdict for defendant, at the close of plaintiff's case, there should be a total want of evidence to support the plaintiff's claim.

There being abundant testimony in chief, for plaintiff, to sustain a verdict for plaintiff; held that the Court would have erred in directing a verdict for defendant, and that the verdict for plaintiff must stand.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of assumpsit brought by the plaintiff, a foreign corporation carrying on business in this Kingdom, against the defendant, a sugar planter, to recover the sum of \$4,172 28, and interest, for money loaned, money laid out and expended, money had and received, goods sold and delivered, and labor and services by plaintiff's servants, according to the accounts annexed to the complaint.

The action was tried at the last October term of the Court, before the Chief Justice and a foreign jury, and resulted in a verdict for the plaintiff.

From the testimony adduced on the part of the plaintiff, it appeared that Claus Spreckels carried on business at Spreckelsville and Kahului, on the island of Maui, and that he had made advances and sold goods to the defendant; that he had carried on business in his own name, but for and on account of himself and certain other parties who were afterwards incorporated in the State of California, under the corporate name of "The Hawaiian Commercial and Sugar Company," the plaintiff herein: That on the 1st of November, 1882, George C. Williams took charge as

manager for the plaintiff, (the accounts between the defendant and Claus Spreckels having been closed) and opened a new account with the defendant, and that advances were made and goods sold to the defendant, and labor performed from time to time until the closing of the account, the plaintiff receiving and accounting for sugars from time to time received from the defendant, leaving the balance claimed owing by the defendant: That the defendant from time to time drew orders upon Claus Spreckels, which were paid by Williams, out of moneys belonging to the plaintiff. Claus Spreckels was president of the plaintiff company during the time covered by the accounts. The plaintiff company was registered in the office of the Minister of the Interior, during the first week in January, 1883. It was also proved that after the 2d of November, 1882, a change was made in the bill heads from "Claus Spreckels" to "Hawaiian Commercial and Sugar Company," and the accounts were regularly delivered to defendant.

Upon the close of the plaintiff's case, counsel for the defendant moved the Court to instruct the jury to render a verdict for the defendant, which the Court declined to do. The defendant excepted and the bill of exceptions came on for argument on the 20th day of January last.

Mr. Dole, for the defendant, contended that the debt was due to Spreckels, and that the plaintiff company, not being registered until January, 1883, the plaintiff could not recover.

Mr. Hatch, for plaintiff, argued that the granting of a non-suit being in the discretion of the Court, exceptions would not lie, and that the testimony showed that the debt was owing to the plaintiff.

BY THE COURT.

The only point raised on this bill of exceptions is, was the learned Chief Justice wrong in refusing to direct the jury to return a verdict for the defendant?

To justify the presiding judge in directing such a verdict, there should be a total want of evidence to support the plaintiff's claim. Can it be said from the evidence set out that the evidence on behalf of the plaintiff failed to show a cause of action?

We think there was abundant testimony on behalf of the plain-

tiff (in the absence of any testimony on the part of the defendant) to sustain a verdict for the plaintiff and that the learned judge would have erred in directing a verdict as requested.

This being the only exception, and no new trial on the ground that the verdict was against evidence having been applied for, we must overrule the exceptions and allow the verdict for the plaintiff to stand.

Exceptions overruled with costs.

F. M. Hatch and *Paul Neumann*, for plaintiff.

S. B. Dole and *Jona. Austin*, for defendant.

Honolulu, February 5, 1886.

AH HONG vs. W. C. PARKE.

EXCEPTIONS TO FINDINGS OF JUDD, C. J.

JANUARY TERM, 1886.

JUDD, C. J ; McCULLY and PRESTON, JJ.

Trespass does not lie against the Marshal of the Kingdom, acting under process of Court, for non-feasance in executing the process.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of trespass *quare clausum fregit*, in which the plaintiff seeks to recover damages from the defendant (the late Marshal of the Kingdom,) for that the defendant, under color of authority, having certain process against the property of the plaintiff, with force and arms broke and entered the close of the plaintiff in said Waipio, to wit, the rice plantation of the plaintiff, and that the defendant, after said entry, held possession of said premises, together with all of the houses, rice-floors, fixtures, crops and appliances thereof, for about a year; that the proper cultivation and harvesting of crops was thereby prevented; that much rice and other property was lost and destroyed by reason of insufficient care and protection by the agents of defendant; that other property was by said defendant, by reason of and

during said trespass, lost and destroyed, to plaintiff's damage of \$5,500.

The case was tried at the last October Term by the Chief Justice, without a jury, and judgment was given in favor of the defendant.

The plaintiff excepted to the judgment as being contrary to law and the evidence, which exceptions were allowed and were argued on the 26th inst.

BY THE COURT.

We see no reason to disturb the judgment of the Chief Justice herein. Counsel for the plaintiff has failed to convince us that the evidence is sufficient to support the plaintiff's claim.

We also are of opinion that the action being against the Marshal acting under the process of the Court, for non-feasance in executing the process, trespass does not lie.

The exceptions are therefore overruled with costs.

P. Neumann and *A. Rosa*, for plaintiff.

Cecil Brown, for defendant.

Honolulu, February 4, 1886.

A. FERNANDEZ vs. PEOPLE'S ICE AND REFRIGERATING COMPANY.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

In an action for damages for a nuisance caused by smoke and soot from the furnace of an ice manufactory, it is no defense that ice is a necessity, and that the price has been reduced by the operation of defendants' factory.

Defendant is liable for any tangible injury caused by smoke and soot to the property or comfort of plaintiff and his family; if the result is in fact a nuisance, it is no defense that the business is lawful and carried on in a reasonable manner.

Exceptions overruled.

OPINION OF THE COURT, BY McCULLY, J.

This case is an action for damages for maintaining a nuisance, to wit: a steam engine running an ice manufactory, from which smoke and soot come on to plaintiff's premises occupied by him as a residence, and on which he has also cottages to let.

The action was tried at the last October term of this Court, before a jury, and resulted in a verdict for plaintiff of \$250 damages.

On the trial a witness for defendant was asked the question: "What has been the effect, as to the price and consumption of ice, of the erection of these (defendants') works?" The question being objected to, the objection was sustained, to which defendant excepted. The defendant then offered to prove "That ice had become a necessity in Honolulu, and that by the carrying on of the defendants' works the price had been less, which was a public benefit." This evidence was refused admission, to which defendant excepted.

Wood's Law of Nuisances collects all the authorities needed for the determination of the points involved in the above proposed questions, and of the other matters which will be referred to below. This author broadly states the law to be that the usefulness of the trade, its actual necessity even, will not operate as a defense, and cites from the ancient case of *Poynton vs. Gill*, wherein action was brought for damages resulting from the smoke and vapors of a lead-melting establishment, these words: "Though this was a lawful trade, and for the benefit of the nation and necessary, yet this shall not excuse the action, for he ought to use his trade in waste places and great commons, remote from enclosures, so that no damage may happen to the proprietors of land next adjoining." This doctrine has been held with great uniformity to the present time. See such cases as *Hutchins vs. Smith*, 63 Barb. 252, dust from limekiln settling on furniture and milk. *Ross vs. Butler*, 19 N. J. Eq., 294, cinders from pottery works settling upon buildings and premises. *Wesson vs. Washburne Iron Co.*, 13 Allen 95, cinders from iron works entering an inn and settling upon furniture. *Cartwright vs. Gray*, 12 Grant's Ch. Cas. 400, cinders from steam planing mill settling upon linen hung out to dry, etc.

It can be no defense in this case that ice may be a necessity, or that the price of it may have been reduced by the operation of defendants' factory. This comes much within the rule, and cases cited above. The proposed questions were properly disallowed, and the exceptions thereto are not good.

The plaintiff requested the following instructions, which the Court gave, and to which the defendant excepted :

"1. That plaintiff is entitled to pure air; that defendant is liable for any tangible injury it causes to the property of plaintiff, such as the discoloration of buildings, furniture, clothing, etc.; by soot, and the prevention of the drying of clothes in the plaintiff's yard.

"2. That defendant is liable for any unreasonable interference with the comfortable enjoyment by plaintiff and his family of his premises.

"3. That if the jury believe that by raising the height of defendants' chimney the smoke would be carried clear of plaintiff's house, defendant would be liable for injury resulting from failure to build its chimney higher.

"4. That, in determining defendants' liability, the jury may take into account the part of the town in which defendant has erected its works, and the previous absence of manufactories from that neighborhood.

"5. The fact that defendant is engaged in a lawful business, carried on in a reasonable manner, and for the public benefit, is no defense, if in fact defendant produces such ill results as amount to a nuisance to plaintiff."

And the defendant requested the following instructions :

"1. Where a person is subjected to inconvenience, through the carrying on of a useful industry, when such an industry is not itself a nuisance, but is a proper pursuit, carried on in a convenient place, the person inconvenienced should not stand upon extreme rights, and bring action in respect of every matter of annoyance.

"2. The law does not regard trifling inconveniences; everything connected with the grievance for which this action is brought must be looked at from a reasonable point of view, and in determining the question whether a nuisance is maintained by

defendant, time, locality, and all other circumstances, should be taken in consideration."

"3. If it is proved to the satisfaction of the jury that the defendant is constantly working to the end of diminishing and removing the inconvenience caused to the neighbors, such fact is one of the circumstances which may be taken in consideration by the jury, as indicated in the instruction.

"4. The jury must be able to find from the evidence that the property of plaintiff has been actually diminished in value before they can render a verdict for the plaintiff on that ground."

The court gave the second instruction and refused the third and fourth, to which the defendant excepted. The Court refused the first instruction, as asked for, but gave it with this modification: "If the injury does not sensibly diminish the value of the property and the comfort and enjoyment of it." The defendant excepted to the refusal and to the charge as modified.

The papers in the case and the notes of evidence taken by the trial justice may be referred to.

In our view the law governing these instructions has already been indicated in the citations made above. Only one decided case is found to support the defendant's contention; Huckentstine's appeal, 70 Penn. St. 102, found in 10 Am. Rep., 669, where it was held that "Brick-burning, being a useful and necessary employment, will not be restrained by injunction, although carried on in the outskirts of a city, because it occasions some discomfort or even injury to those residing in the vicinity."

In this case the Court dismissed the bill without prejudice to any right to recover in an action at law. But the editor of these decisions brings forward many cases which controvert the doctrine of the above. In *Campbell vs. Seaman*, 2 N. Y. Sup. 231, the Supreme Court of New York say it is in direct conflict with the laws of this State, and cannot be adopted here as law, and plaintiff obtained an injunction to restrain the defendant from using mineral coal in his process of burning brick. In *Walter vs. Selfe*, 4 De Gex & Smale, a case often referred to by other authorities, the Vice Chancellor granted an injunction against the defendant's burning a brick-kiln on a site near plaintiff's grounds and residence, from which the prevailing winds brought over the

smoke and gases, thus expressing the vital question of the case: "Ought this inconvenience to be considered in fact as more than fanciful, as more than one of mere delicacy or fastidiousness, interfering materially with the ordinary comfort, physically, of human existence, not according to elegant and dainty modes of living, but according to plain and sober and simple notions among English people. And I am of opinion that this point is against defendant."

The evidence in the case before us is to the effect that smoke and soot, in the prevailing wind, came over in considerable quantities from the defendant's chimney—especially at the beginning of firing up—to the extent of preventing the doing of domestic washing on the premises, as had been done previous to the operation of defendant's factory, the clothes getting covered with soot on the lines; of compelling the plaintiff to keep the windows of his chamber closed at night, whereby they suffered from heat and non-ventilation, of covering the dining-table with soot, of sooting and smudging the children at play in the yard. Furthermore, that the plaintiff having set off a portion of his premises, and built houses to let thereon, had lost a tenant by the nuisance of the smoke to him, and was prevented from letting such houses.

We think that upon the authorities cited the instructions given were demanded by the evidence, and that the jury was properly instructed to find on those principles.

The exceptions are overruled.

F. M. Hatch, for plaintiff.

Paul Neumann and *W. A. Whiting*, for defendant.

Honolulu, February 4, 1886.

SEE HOP COMPANY *vs.* S. F. CHILLINGWORTH.

EXCEPTIONS TO FINDINGS OF McCULLY, J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

A complaint and search warrant for opium held to sufficiently describe the premises to be searched, and to allege probable cause; but as the complaint failed to allege, according to Chapter 48, Penal Code, that the article "is necessary to be produced as evidence or otherwise on a criminal trial;" he'd, following *Hang Lung Kee vs. Bickerton*, 4 Hawn. 584, that the complaint is defective in this material point.

Judgment for plaintiff affirmed.

FINDINGS OF McCULLY, J., EXCEPTED TO.

THE defendant is a Deputy-Sheriff of the Island of Maui. The plaintiffs, in an action of case, complain and claim damages for a search made of their premises by the defendant, pursuant to a search warrant, which is given below, with the complaint on which it is based.

Complaint for Search Warrant. To Honorable L. Aholo, Police Justice in and for the District of Wailuku.

Saml. F. Chillingworth, Deputy-Sheriff of Maui, at Makawao, on oath, complains and informs the said Justice that your affiant is informed and verily believes that opium is in the possession of one Yee Hop, or See Hop, at Kahului, District of Wailuku, and that said opium, or a portion thereof, is concealed in and on the premises of Yee Hop at Kahului, aforesaid, and that said Yee Hop, or See Hop, is not a duly licensed physician or surgeon, nor did he receive said opium from the Board of Health, and that said opium is contraband in law, and prays a warrant to search for the same.

Dated this 6th day of February, 1885.

(Signed) SAML. F. CHILLINGWORTH.

Subscribed and sworn to this 6th day of February, 1886.
Before (Signed) L. AHOLO.

Police Justice of Wailuku.

SEARCH WARRANT.

Maui ss.

To the Marshal of the Hawaiian Kingdom, his Deputy, or to any constable of the District of Wailuku.

You are required and commanded forthwith, with necessary and proper assistance, to enter into the house, grounds and premises of Yee Hop mentioned in the annexed information and complaint, and there to diligently search for the goods and articles specified in the said complaint, and if the same, or any part thereof, shall be found on such search, that you bring the goods and articles, so found, together with the body of the said Yee Hop (if found in your District) before me for examination.

Make due return of this Writ and of your proceedings thereon with all convenient speed.

Given under my hand this 6th day of February, 1886.

(Signed)

L. AHOLO.

Police Justice of Wailuku.

The parties come into Court and agree that a verdict be entered against the defendant, with damages fifty dollars, subject to the ruling of the Court upon the sufficiency of the complaint.

BY THE COURT.

The requisites of the Constitution as to search warrants are, (Art. 12,) probable cause, supported by oath or affirmation, and description of the place to be searched and the persons or things to be seized. The premises to be searched are in this complaint, I think, sufficiently described, and the article to be seized, if found, is stated as opium, an article which it was a criminal offense to have in possession. Information and belief, which are more than suspicion, being sworn to, may be "probable cause" on which a warrant may issue. So far, then, as the Constitution prescribes particulars, the information in this case is complete.

It complies with the ruling of the Court in *Hang Lung Kee vs. Bickerton and Parke*, 4 Hawn. 584, in charging that the opium concealed on the described premises is in the possession of a per-

son named. But the Court also say that "the search warrant can only be issued (unless elsewhere granted by statute) for the purposes specifically named in the statute, and it is clear that there must be an affidavit that the articles sought to be discovered are necessary to be produced as evidence, or otherwise, on a criminal trial." The statute referred to is Chap. 48 Penal Code, wherein it is provided that search warrants may only issue (unless elsewhere granted by statute) in four cases, to discover stolen property, etc., to seize forged instruments or counterfeit coin, etc., to seize arms or munitions, etc., and fourthly, to discover articles necessary to be produced as evidence, or otherwise, on the trial of any one accused of a criminal offense.

Section 901, Civil Code, in providing for a warrant for the search of property wrongfully secreted, requires "some judicial purpose to be stated in the application." No allegation to this effect appears in the complaint in this case. Under the authority and the statute quoted, I am bound to hold that the complaint, while complete in all other respects, is defective in this material point.

Judgment will be entered on the verdict for the plaintiffs.

A. S. Hartwell, for the plaintiffs.

The Attorney-General, for the defendant.

Honolulu, August 20, 1885.

BY THE COURT IN BANCO.

We have considered the question raised by the exception and the decision as rendered by the presiding justice, and see no reason to disagree with it, and therefore confirm the judgment rendered in favor of the plaintiff.

Honolulu, February 5, 1886.

CHRISTINE DIAS, by her father AUGUST DIAS, vs. FRANK GILLILAND.

APPEAL FROM DECISION OF JUDD, C. J.,

OVERRULING DEMURRER.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

A complaint is not demurrable on the ground that a father, suing on behalf of his daughter, a minor, failed to obtain leave of Court (under Rule XX): it is, at most, an irregularity, which might be amended by application to a judge at chambers.

A complaint for breach of promise of marriage held to sufficiently allege a promise.

Plaintiff entitled her action "Damages," and claimed "for injury done by the said defendant to the person, the character and the feelings of the plaintiff:" held that she followed the form in Section 1,116, Civil Code, too closely, and treated the action as for a tort, whereas it should be assumpsit: and that the words last quoted may be treated as surplusage.

Demurrer overruled.

OPINION OF THE COURT, BY PRESTON, J.

THIS action, which is for a breach of promise by the defendant to marry the plaintiff, was commenced on the 14th of September last.

The plaintiff claims the sum of two thousand dollars for damages resulting to her "for injury done by the said defendant to the person, the character and the feelings of the plaintiff," and alleges the promises and breach. The plaintiff also alleges her seduction by the defendant under the promise to marry, and further alleges that the matters complained of "were done in contravention of her private rights under the law."

To this complaint the defendant filed a demurrer alleging for cause:

1. That it did not appear that August Dias had obtained leave to bring suit on behalf of the minor.

2. That the form of action is not stated in the caption.
3. That it is not alleged that a reasonable time had elapsed since the making of the alleged promises and before breach.
4. That as to the promise alleged to have been made by defendant on the 12th or 13th day of September, 1885, it is not alleged that the plaintiff promised to marry the defendant on that occasion.
5. That said declaration hath improperly united two separate and distinct causes of action.
6. If said causes of action are properly united, the same are incomplete as not containing a statement of the necessary parts of a cause of action.
7. That the declaration is not subscribed by plaintiff.
8. That it is not sworn to by the party authorized and required to do so.

This demurrer was argued before the Chief Justice at the last October term and was sustained on the first, second, seventh and eighth grounds, leave being given to amend.

The plaintiff amended the complaint according to the decision of the Chief Justice, except that in the form of action in the caption she inserted the word "damages" only.

The defendant demurred to the complaint as amended, assigning for grounds :

1. That the declaration as amended is not properly entitled, there being no such action as "damages" known to the law. Other four points were the same as points 3, 4, 5 and 6 of the original demurrer.

The matter was submitted to the Chief Justice without argument (by consent), who, on the 28th of December last, overruled it.

The defendant appealed, and the matter was argued on the 13th of January last.

BY THE COURT.

This cause coming up on demurrer, it becomes necessary to review the whole record.

With respect to point 1, we do not think the complaint is demurrable on this ground; it is at most an irregularity which might be amended by an application to a judge in chambers.

With respect to the second and third points (3 and 4 of the original demurrer), we are of opinion that the defendant's objections fail. As we understand the declaration, it alleges divers promises during the year 1883 and subsequently, and an express promise to marry the plaintiff on the 12th or 18th day of September, 1885, and breach of such promise. We do not understand the plaintiff to allege a promise on the 12th or 13th of September, but that the marriage was to take place on one of those days.

The other points require more consideration. It appears to us that the plaintiff has followed the form given in Section 1,116 of the Civil Code, as a form which may be adopted in actions for unliquidated demands, too closely, and has got into a difficulty in that she claims damages for injury to her person, feelings and character, in the same complaint. The action appears to be treated as for a tort, whereas it should be contract (assumpsit).

We do not think the plaintiff intended to claim damages for two separate causes of action; the allegation as to her seduction is suggested as matter of aggravation to increase the damages and may properly be made, so that on these remaining points the demurrer must be overruled.

We think that the words which are included in inverted commas in the stating part of this decision may be treated as surplusage and may be stricken out, and we give leave to the plaintiff to amend accordingly.

Under all the circumstances of this case, we think the costs of the demurrers and of this appeal should be divided, and that the defendant have twenty days to answer. . . .

Jona. Austin, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, February 6, 1886.

AWA *et al.* vs. J. M. HORNER *et al.*

QUESTION RESERVED BY PRESTON, J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

There being no feudal tenures in this Kingdom, the reason for the common law rule of joint tenancy has no existence here.

A Grant by Royal Patent to two persons and their heirs, held to create a tenancy in common.

OPINION OF THE COURT, BY JUDD, C. J.

THE case comes to this Court on the following statement by Mr. Justice Preston from the present term :

"This is an action of ejectment to recover one undivided moiety of a parcel of land containing 112 acres, situate in Kekua-lele and Kaiukuiki, Hamakua, Hawaii, which the plaintiffs claim as the heirs-at-law of one Halli, one of the patentees of the land.

"The plaintiffs produced a royal patent (Grant), No. 2,489, issued to Pi and the said Halli, their heirs and assigns, and claimed that the patentees were tenants in common.

"The defendants, on the contrary, claimed that the patentees held the land as joint tenants.

"Whereupon counsel for the parties requested me to reserve the question for the consideration of the full Court, pursuant to Section 832 of the Civil Code, which I consented to do.

"The question, therefore, is: Did the said Halli and Pi hold the land as tenants in common or as joint tenants?"

BY THE COURT.

It is somewhat remarkable that a question so important as this, involving titles to land all over the kingdom, should not have been earlier presented to the Court for adjudication.

Says Washburn, in Real Property, p. 407: "By the common law in England, where an estate is conveyed to two or

more persons, without indicating how the same is to be held, it will be held to be in joint tenancy, upon the feudal idea that the services due to the lord should be kept entire."

But the common law is not in force in this Kingdom *proprio vigore*. It has frequently been so held by this Court. That we are, however, free to adopt the reasonings and principles of the common law is undoubted. This authority is expressly conferred upon the Court by Sections 14 and 824 of the Civil Code. To do this we must be satisfied that the principle to be adopted is "founded in justice, and not in conflict with the laws and customs of this Kingdom."

Upon careful consideration, we think it would be unwise to adopt the principle contended for by defendants.

Mr. Washburn says, *ib.* 408: "The policy of the American law is opposed to the notion of survivorship, and therefore regards such estates as tenancies in common. In many of the States the rule of survivorship is abolished by statute, except in case of joint trustees, while in others all estates to two or more persons are taken to be tenancies in common, unless expressly declared to be joint tenancies by the deed or instrument creating them, with a similar exception of estates to joint trustees."

In this Kingdom, as in the States, there are no feudal tenures existing, requiring services from the land-holder to the lord paramount. The reason, therefore, for the rule has no existence here.

The most natural and obvious view would be that where land is conveyed to two or more persons, it was their expectation that it should descend to the heirs of each of them and not to the survivor of them. We believe it to be true also that such conveyances have been generally understood and treated in this Kingdom as creating estates of tenancies in common, and we ought to hold for the protection and peace of land titles that such is the law of the country.

The conveyance before us is a Royal Patent or Grant by the King, representing the Government, to two natives, who have no apparent relation to each other, of 112 acres of land, at twenty-five cents per acre. Certainly when these men bargained for the land, if they had supposed that by the fact that they took this

land by virtue of the same conveyance, they thus were becoming joint tenants, and that the land would go to the survivor, it would have been quite competent for them to obtain separate grants. Moreover, we think the words in the *habendum* clause, to them and their (*laua*) heirs, or as it may be translated, "the heirs of them two," have force in favor of the contention that a tenancy in common was intended.

We are, therefore, of the opinion that Halli and Pi, the patentees, held the land as tenants in common, and remand the case to Mr. Justice Preston, to be decided in accordance with this view.

Kinney & Peterson, for plaintiffs.

L. A. Thurston, for Horners.

A. Rosa, for Mele.

Honolulu, February 24, 1886.

THE KING vs. AH LEE and AH FU.

EXCEPTIONS FROM CIRCUIT COURT, SECOND JUDICIAL CIRCUIT.

JANUARY TERM, 1886.

JUDD, C. J; McCULLY and PRESTON, JJ.

A lottery is a "game" within the meaning of Sec. 1, Chap. XXXIX, Penal Code.

The jury having convicted defendants upon the evidence of one witness; held that a new trial should not be granted.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

At the last term of the Circuit Court for the Second Judicial Circuit, held at Lahaina, in December last, the defendants were convicted of the offense of gaming.

The evidence for the prosecution was to the effect that on the

29th of October last, H. G. Treadway, Deputy-Sheriff at Wailuku, entered the defendants' premises at Wailuku, under a search warrant; that the defendant, Ah Lee, was lying apparently asleep in a room, and that two stamps and a book were found on the table, and some money (\$98 05) in two drawers, also thirteen books under the table, and some lottery tickets, and other lottery apparatus. Some of these articles were found under the mattress upon which Ah Lee was lying. The witness, Treadway, testified as to the manner in which the drawing was conducted. The defendant, Ah Fu, was found in a room upstairs, preparing to escape, and other papers were found in this room.

Ah Mau testified that he purchased lottery tickets from Ah Fu, one day in the last week in October, (for one Aki) paying \$2 95 for them; that the money was paid to Ah Fu, who handed it to Ah Lee; that Ah Lee took a lottery ticket which he handed to Ah Fu, who gave it to witness, who delivered it to Aki; that the ticket (produced) was the lottery ticket, and it did not win; that the books, stamps and papers produced were for use in connection with a lottery.

Aki testified to giving money to the previous witness to purchase lottery tickets, on October 26th, and received the ticket produced; that he took the ticket to defendant, Ah Lee, who told him it had not drawn anything; that he never got his money back. The books seized by Treadway contained accounts of the gains and losses of the lottery or bank.

For the defence the defendant, Ah Lee, testified that he did not know either of the witnesses, Ah Mau, or Aki, never saw either of them before hearing at the Police Court—did not sell the ticket—never saw it before prosecution—neither of the witnesses, Ah Mau or Aki, came to him before the prosecution for the purpose of buying or otherwise concerning a lottery ticket—and never had any dealings with either of them.

Ah Fu, the other defendant, was called, but his evidence was not taken, as it was admitted by the prosecution that he would testify to the same effect as his co-defendant.

The jury convicted the defendants.

The defendants excepted to the verdict as against the law, and being contrary to the evidence, and gave notice of a motion for a new trial.

The motion and exceptions were argued on the 19th inst., when C. W. Ashford contended that there was no evidence of the sale of the lottery tickets by the defendants; that the defendants, having testified that they did not sell the tickets or have any knowledge of the witnesses, Ah Mau and Aki, it amounted to the testimony of two against one, as the witnesses only deposed to separate transactions on different occasions, and that there was no evidence that any money had been lost or won by the defendants.

The Attorney-General contended that the evidence was sufficient, and the jury having believed the witnesses for the prosecution, a new trial should not be granted.

BY THE COURT.

Section 1, of Chapter XXXIX, of the Penal Code enacts:

"Whoever, by playing at cards or any other game, wins or loses any sum of money or thing of value, is guilty of gaming."

A lottery is a game within the meaning of this section.

If the evidence of the witnesses is believed, it must be the fact that these defendants won the money paid by Ah Mau for the ticket produced.

It is not denied that the various articles stated by the Deputy-Sheriff to have been found in the rooms of the defendants were so found.

It was entirely a question for the jury as to whether they believed the defendants or the witnesses for the prosecution, and they having the right to convict, even upon the evidence of one witness, if they believed him, and having convicted the defendants, we think that according to the decisions of this Court, a new trial should not be granted, and therefore overrule the exceptions, with costs.

Attorney-General, for the Crown.

Ashford & Ashford, for defendants.

Honolulu, March 2, 1886.

KONG KEE *vs.* KAHALEKOU.

EXCEPTIONS TO FINDINGS OF McCULLY, J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

A lessor, desiring to oust a tenant for non-payment of rent, must pursue the legal remedy afforded him by statute; if he takes forcible possession of the premises, he makes himself liable, as bailee, for the goods of the tenant therein.

In a jury-waived case, the finding of the Court on the facts will be treated like the verdict of a jury; if there is evidence to support it, it cannot be disturbed.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

The plaintiff became, on the 4th of June, 1885, a tenant of defendant by purchase at a Marshal's sale of the leasehold of defendant. By the lease a rent of \$20 was due in advance on the 1st of January and June of each year. Defendant demanded \$40 rent of the plaintiff soon after he purchased the lease. Plaintiff offered to pay for the six months in advance, from June 1st to last of December, but said he was not required to pay the rent for the six months prior to his purchase. The defendant then ejected plaintiff from the premises by force, closed the store containing goods of plaintiff's, and kept him out of possession for two weeks.

This action is brought for damages for the unlawful eviction, including \$308 in money, which the plaintiff alleges was in his store when he was ejected therefrom, and which disappeared during defendant's unlawful possession.

Mr. Justice McCully tried the case, the jury being waived, and found for the plaintiff \$500 damages.

The case comes to us by exception from a finding of law, that where the statute prescribes a method of redress to a landlord, it must be followed (citing *Brewer vs. Chase*, 3 Hawn. 136), and that the findings of fact were contrary to the evidence.

BY THE COURT.

The lease contained a provision for forfeiture in case of non-payment of rent. We have provided for by statute a summary method by which a lessor can recover possession of his premises in certain cases, and among these where the tenancy has been determined by reason of forfeiture under the conditions of covenants in such lease. (Compiled Laws, p. 274.) The forcible entry was not justified. They are discountenanced in the law, as leading to breaches of the peace. The lessor should have pursued his legal remedy, and has, by taking forcible possession of the store on the premises, made himself liable, as bailee, for the goods of plaintiff therein.

We think the law was correctly laid down by the trial justice.

So far as the judgment on the facts is concerned, we are obliged to treat it as if a jury had rendered a verdict. There was evidence, which the Justice believed, that an amount of \$308 in cash was on the premises when defendant closed the store and took possession. Under repeated rulings of this Court, such a judgment cannot be disturbed.

Exceptions overruled.

W. R. Castle, for plaintiff.

J. M. Poeppoe, for defendant.

Honolulu, March 8, 1866.

H. RIEMENSCHNEIDER, ADMINISTRATOR, vs. WM. KALLAEHAO.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

JANUARY TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Marriage does not vest choses in action of the wife in the husband, unless he takes steps to reduce them to possession during coverture; so held as to promissory notes made to the wife by a third party, for a loan made out of her private money.

A carriage and horses bought by the wife with money derived from sale of her land; held to be the property of the husband.

New trial ordered, unless plaintiff files *remittitur*.

OPINION OF THE COURT, BY PRESTON, J.

THIS case comes up on a bill of exceptions to the rulings of the Chief Justice on the trial of the action before a mixed jury at the last October Term.

The action is in trover, and is brought by the administrator of the estate of William Harbottle, deceased, for the wrongful conversion of one express carriage or hack, of the value of \$350, in the lifetime of plaintiff's intestate. A second count alleges a conversion, since the intestate's death, of four horses, four sets of harness, one express carriage and three certain promissory notes for sums amounting in the whole to \$1,200.

From the testimony it appears that one express carriage and three horses, part of the property claimed by the plaintiff, were sold or taken by the defendant, who married the widow of the intestate.

Two of the promissory notes, one for \$500, and the other for \$106, were made by one Alo, in favor of the intestate's wife, and payable to her order, during the life of the intestate and at his express direction, and judgment was obtained by the defendant and his wife against the maker, after the death of the intestate. The whole amount was not recovered, but the suit was compro-

misled by Alo paying the defendant a part of the amount, \$245. The consideration for the note for \$500 was alleged by the defendant to have been that amount lent to Alo, \$250 of which was alleged to have been the private money of Mrs. Harbottle and \$250 the money of the intestate.

It was also claimed that the carriages and horses were the private property of Mrs. Harbottle, it being alleged that they were purchased by her, out of moneys derived from the sale of land belonging to her, and from rents and receipts for the use of the carriages. The intestate was bed-ridden and had been so for many years, and there was some evidence that money earned by the hire of the expressmen was paid to him.

Counsel for the defendant asked the Court to direct the jury (*inter alia* :)

"1. That marriage does not vest choses in action of the wife in the husband unless he shall do some act during coverture to appropriate them. If the husband dies before doing so, they remain the property of the wife."

"2. Actual reduction to possession by husband of wife's choses in action is necessary to bar the wife's right of survivorship."

Which instructions the Court refused, but charged the jury (*inter alia* :)

"If you find that those hacks, etc., were bought with money received from her (*i. e.* intestate's wife) lands, and from the earnings of her horses and carriages, subsequently, you will find them to be the property of her husband. Anything in her possession, whether bought with her own or her husband's money, belongs to him and is his own property and goes to his administrators. Although the note was made to the wife, it was the husband's money and belongs to his estate. Any note given or payable to Harbottle's wife, executed during her coverture, was the property of her husband, and since his death the property of the administrator of Harbottle's estate."

To which and other instructions, (which it is unnecessary to refer to here) and to the refusal to direct as requested, the defendant, by his counsel, duly excepted and such exceptions were allowed. .

The exceptions were argued on the 19th day of February, last,

by S. B. Dole for the defendant, and C. W. Ashford for the plaintiff.

The following authorities were referred to by defendant's counsel:

Schouler's Domestic Relations, 115, 114, 150; *Hasslocher vs. Ex'rs of Robinson*, 3 Haw. n., 802; 2 Kent's Comm., 115, note c; 2 Leigh Nisi Prius, 1199; *Estate of Hinds*, 5 Whart.; *Pierce vs. Briggs*, 4 Haw. n., 493; *Gatero vs. Madeley*, 6 M. & W. 425; *Scarpellini vs. Atheson*, 7 Q. B., 447:

And he submitted that the notes were choses in action, and that the intestate not having reduced them into possession, they became the property of his wife after his decease, and that the other articles of personal property, having been purchased with her own money, they became her own separate estate.

C. W. Ashford, for the plaintiff, claimed that notwithstanding the promissory notes were made payable to the wife, they were in fact the property of the intestate, and that the possession by the wife of the notes and other property was the possession of the husband.

The jury gave their verdict (one dissenting) for the plaintiff, and assessed the damages separately, as follows:

One carriage.....	\$100 00
Three horses.....	150 00
Notes.....	245 00

BY THE COURT.

On a full consideration of the case, the evidence and the authorities referred to, we are of opinion that the presiding judge should have instructed the jury that the promissory notes in question were choses in action of the wife, and that the intestate not having taken any steps to reduce them into possession, they did not pass to the plaintiff, and that consequently the verdict should have been for the defendant in respect of such notes.

The cases of *Shuttlesworth vs. Noyes*, 8 Mass., 229, and *Commonwealth vs. Manley*, 12 Pick., 173, which appear to conflict with this view, are overruled by *Hayward vs. Hayward*, 20 Pick., 517, and other cases.

But with regard to the carriage and horses, we think that the

jury were properly instructed, and that the evidence supports the verdict as to those items.

We therefore hold that a new trial should be had between the parties, unless the plaintiff remits the damages, \$245, and interest, awarded in respect of the promissory notes, and do so order. The costs of the former trial to be costs in the cause, each party to pay his own costs of the exceptions.

Ashford & Ashford, for plaintiff.

S. B. Dole, for defendant.

Honolulu, March 8, 1886.

THE KING *vs.* AH SING.

EXCEPTIONS FROM CIRCUIT COURT, SECOND JUDICIAL CIRCUIT.
JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Charge to the jury, as to facts constituting possession of opium by defendant, held to be justified by the evidence, and unobjectionable.

There being evidence to justify the verdict, it cannot be set aside.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

The defendant was convicted in the Police Court of Walluku of the offense of having opium unlawfully in his possession, and appealed from such conviction to the Circuit Court of the Second Judicial Circuit, which appeal came on for trial before a foreign jury at the last December Term of the said Court at Lahaina, McCully, J., presiding, Fornander, Circuit Judge, being also present. The jury rendered a verdict of guilty. The case turned upon the fact as to whether the defendant had the actual possession of the box containing the opium (18 tins).

Counsel for the defendant requested the Court to direct the jury:

"1. In order to convict the defendant, the jury must be convinced beyond a reasonable doubt that he had, in his own undivided possession and not subject to any custody by others, a quantity of opium, with full knowledge that the package contained opium.

"2. It is not sufficient that he should have approached or taken hold of the box, or even admitted its ownership. If he either is not proven to have known its contents, or was merely preparing to assume its possession when arrested (knowing its contents), he should be acquitted."

Which instructions the Court gave, but added (*inter alia*) :

"I charge you that if the statement of Sheldon is true, it supports possession. If defendant was expecting to receive opium and took it (the box) to himself as such, that would convict him. That if the jury should find that the wagoner offered to deliver to the defendant the box in question, placed it at the disposal of the defendant, and interposed no condition to his at once taking it from the dray, and that defendant thereupon advanced, as though to take the box, and took hold of it, and proceeded until stopped by his arrest, that was an appropriation of the box by defendant, and constituted possession thereof by him, and if there was opium in the box, that constituted opium in possession. It was not necessary for defendant to remove the box in order to perfect his possession."

To all of which said charge and instructions, except that portion requested as aforesaid, defendant's counsel then and there excepted, and also excepted to the verdict as being contrary to the law and the evidence.

The exceptions were argued on the 18th of February last by C. W. Ashford, for defendant, and Paul Neumann, Attorney-General, for the Crown.

BY THE COURT.

The instructions asked for and given were extremely favorable to the defendant. The other parts of the instructions (excepted to) were, we think, justified by the evidence, and were unobjectionable.

The case was left to the jury on the evidence, and we, being of

opinion that there was evidence to justify the verdict, cannot, according to the decisions of this Court, set aside the verdict of the jury.

The exceptions are therefore overruled and a new trial denied.
Paul Neumann, Attorney-General, for the Crown.
Ashford & Ashford, for defendant.
 Honolulu, March 6, 1886.

THE ONOMEA SUGAR CO. *vs.* H. C. and F. H. AUSTIN.

APPEAL FROM DECISION OF PRESTON, J.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

The Onomea Sugar Co., having accepted a charter, and organized by election of officers and adoption of by-laws, held to be a duly and legally organized and existing corporation.

Defendants' assignor, being the owner of all the stock in the Onomea Sugar Co., sold it to C. Brewer & Co., to cover the corporation's debt to them, and C. Brewer & Co. agreed to sell it back to him within a year for the amount that the account stood them in, with interest; held that C. Brewer & Co. had the right to vote the stock while they held it.

Officers of the corporation of C. Brewer & Co. held not to be disqualified from holding office in the Onomea Sugar Co.

Judgment affirmed.

OPINION OF THE COURT, BY McCULLY, J.

The bill prays for an injunction. It is brought by J. O. Carter, as President of the plaintiff company. The injunction was issued by Mr. Justice Preston, to whom the bill was addressed in the first instance.

The real issues involved in this suit and another in which the several parties in interest herein are likewise concerned, are stated in the following stipulation executed by their counsel.

Matters of fact or evidence, and points of argument necessary to be stated, in addition to those set forth in the stipulation, will be stated in their place in the opinion :

STIPULATION.

"It is stipulated and agreed by counsel for complainant and respondents that at the hearing of the appeal from the order of Mr. Justice Preston refusing to dissolve the injunction issued in this cause, before the full Court in Banco, the following questions of law shall be passed upon by the Court :

"1. Is there any such corporation as the Onomea Sugar Co., duly and legally organized and existing ?

"2. Had C. Brewer & Co., or any person on its behalf, any right to attend meetings of the stockholders of the Onomea Sugar Co., and to vote at such meetings, by virtue of the transfer of shares made to them by S. L. Austin on the 14th day of October, 1884 ?

"For the purpose of enabling the Court to make a decision upon the above points, the following documents may be produced and considered as in evidence, and the following facts are agreed upon :

1. The charter of the Onomea Sugar Co.
2. All books of the Onomea Sugar Co.
3. The certificates of shares issued to S. L. Austin, and the indorsements and the certificates issued to C. Brewer & Co.
4. The conveyance from S. L. Austin to defendants of his right to redeem the shares transferred to C. Brewer & Co.
5. Deed from S. L. Austin *et al.* to the Onomea Sugar Co.
6. Charter of C. Brewer & Co.

"It is agreed that Herbert C. Austin and Franklin H. Austin were not present at the meeting held to organize the Onomea Sugar Co. in person, but that H. C. Austin was represented at said meeting by Jona. Austin, his proxy ; that the officers elected at the meeting held October 21, 1882, were regularly elected, provided said company was regularly and formally organized ; that the transfer of shares by S. L. Austin to C. Brewer & Co. was recorded on the books of the Onomea Sugar Company before the election of officers claimed to have been held on November

12, 1884, but without knowledge or express authority of S. L. Austin, except as such record and the right to make the same was authorized by said transfer to C. Brewer & Co.; that all notices required by law or the charter of said company, relating to said meeting of November 12, 1884, were duly given, and a list of the officers claimed to have been elected at said meeting was duly published in the *Saturday Press* for four weeks.

"The decision of the above questions shall be binding also upon the parties in the suit of *S. L. Austin et al vs. C. Brewer & Co.*, but the right of complainants in the last mentioned suit to redeem said shares shall not be finally decided upon this submission, and the Court shall go into the nature of the transaction upon the transfer of said stock only so far as is necessary to determine who had the right to vote the shares on November 12, 1884, and to that extent only shall the decision of the Court herein be binding upon the parties in the suit of *S. L. Austin et al. vs. C. Brewer & Co.*"

The first question of the legal existence of the plaintiff, as a corporation, was not raised before the Court below.

The defendants' contention is that the charter was never legally accepted by the petitioning corporators.

Upon examining the charter before us, we find the preamble to state that:

"Whereas, Stafford L. Austin, Herbert C. Austin and Frank H. Austin, of Hilo, etc.," have duly applied, but the granting part reads, "hereby make, constitute and appoint the said Stafford L. Austin, Herbert C. Austin, and their associates and successors, a body corporate." It must then be considered that the original corporate members were the only two individuals named in the grant.

By the record book of the corporation it appears that, October 21, 1882, the day following the date of the charter, there was held a meeting of the subscribers to the stock of the company, at which were present S. L. Austin in person and H. C. Austin and F. H. Austin by proxy to Jonathan Austin. The stipulation admits only the presence of H. C. Austin by proxy. F. H. Austin not being, however, a charter member, the whole of the incorporators were present in person or by proxy. Counsel for

defendants claim that a proxy sufficient to authorize a representation for an absent stockholder to vote at subsequent meetings would not authorize him to act for his principal at the first meeting of the incorporators. But this proxy was given for the purpose of action in the first meeting of the company, when the acceptance of the charter was the first business and a necessary preliminary to organization. The provisions of Sections 1429 and 1480 of the Civil Code authorize the action by proxy without any restriction. But, say defendants' counsel, no stock had then or since been issued to H. C. Austin or F. H. Austin. The record of the meeting, however, makes him a subscriber for 2,400 out of the 24,000 shares.

Next it appears that H. C. Austin, having been a partner in one-tenth with S. L. Austin, joins in the deed conveying the real and personal property of the plantation to the corporation. Following that, we find the defendants throughout their answer admit the existence of the corporation, only denying the validity of the election of the present officers. And until subsequent to the election of October, 1884, the defendants have been holding employments on the plantation under the appointment of S. L. Austin, as President of this corporation. They claim in this answer to be "members of the legal, though artificial, entity of the Onomea Sugar Co."

Under these facts, it might be sufficient to hold that these defendants are estopped from denying the existence of this corporation. But we go further than estoppel as to these parties. It is established as to everyone, and for all purposes, that the charter members of the proposed company duly accepted their charter, and thereupon organized by the election of officers and adoption of by-laws, and so acquired the privileges and incurred the responsibilities of a corporation. Force is to be given to continued action and to acts of acceptance and ratification.

Angell & Ames on Corp., Ch. 2, Sec. 8; *Bank of U. S. vs. Danbridge*, 12 Wheat. 71; *Rex vs. Amery*, 1 Term R. 575.

The second question is of the right of C. Brewer & Co., or any person on its behalf, to vote on stock transferred to them by S. L. Austin.

It appears that the entire stock, consisting of 24,000 shares,

had been issued to S. L. Austin, and on October 14, 1885, he transferred this to the corporation of C. Brewer & Co., to cancel the indebtedness existing, and necessary to be presently incurred, by writing on the back of each of the two certificates which represented these shares, the words, "Sold to C. Brewer & Co., as of October 1, 1884," signing the indorsement and delivering the certificates.

C. Brewer & Co. then executed and delivered to S. L. Austin the following instrument:

"HONOLULU, October 14, 1884.

"S. L. AUSTIN, ESQ., PRESENT—*Dear Sir:* As you sold and transferred to us the entire amount of stock in the Onomea Sugar Company for amount of its debt as of October 1, 1884, estimated to be as follows, viz:

Book acct. General acct., October 1.....	\$ 63,530 92
" Special " " 	4,610 89
Bonds, due May, 1884.....	25,000 00
" " " 1885.....	25,000 00
	<hr/>
	\$118,141 81
Less estimate value of sugar in hand.....	10,756 41
	<hr/>

Estimated total debt October 1, 1884.....\$107,385 40

"In settlement of which you have sold us all of the stock in the Onomea Sugar Company, thereby cancelling all agreements now outstanding on account of Onomea Sugar Company, so far as you are personally concerned. Say certificates No. 2, for 22,500 shares and No. 3, for 1,500 shares, making a total of 24,000 shares of stock.

"We agree to sell back to you all the stock of the Onomea Sugar Company in our possession at any time up to October 1, 1885, for the amount that the account stands us in at the time of the sale to you, charging interest at the rate of ten per cent. (10 per cent.) per annum on all debts and the same rate of interest on all credits from sales of stock or dividends. We to have the privilege during the time of selling stock up to a fraction less than one-half of the whole stock, applying the sales of stock made by us and the dividends on our part of the stock to reducing the accounts.

"We also agree to pay you the sum of two thousand dollars (\$2,000) from October 1, 1884, to October 1, 1885, payable in monthly installments of \$166 66, the same to be paid on the 1st day of each month, and to be charged by us as part of the expenses of the Onomea Sugar Co.

"Yours, etc.,

C. BREWER & COMPANY,
By its President, P. C. Jones, Jr.
C. BREWER & COMPANY,
By its Trésaurer, J. O. Carter."

The privilege of buying back was assigned to these defendants by the following endorsement on the above agreement:

"For and in consideration of the sum of one dollar (\$1 00) to me in hand paid, and in consideration of the fact that a considerable amount of the stock conveyed to C. Brewer & Co., as per the within statement of agreement actually belonged to them, I hereby grant, make over and sell all my right to redeem and buy back the controlling interest in Onomea Sugar Company to my sons, Frank Hale Austin and Herbert Clark Austin."

"Onomea, December 10, 1884.

(Signed) S. L. AUSTIN."

Another assignment of later date was also introduced in evidence. It is fuller in its terms, but does not convey more than this is intended to convey, and we do not think it need be cited, as relating to a transaction between other parties than those before the Court. The instrument from Brewer & Co. to S. L. Austin cannot be interpreted by any construction given it by S. L. Austin in assigning his rights.

The stock was transferred on the stock book and new certificate issued to C. Brewer & Co., November 12, 1884, the certificate being signed by the officers elected by their voting on this stock at the meeting of that date.

The contention of the defendants is that this transaction constitutes a mortgage, or, if it be preferred, a mere pledge of stock, and that the right of voting remains in the mortgagor or pledgor, citing:

Jones on Ch. Mort., Sec. 1-19; *Polhemus vs. Trainer*, 80 Cal., 685; *Beecher vs. Wells Man. Co.*, 1 McCrary, 62; *Brewster vs.*

Hartley, 97 Cal., 15; *Powell vs. Thompson*, 3 Cranch C. C., 428; *Ex parte Willcocks*, 7 Cowen, 402; *Ex parte Parker*, 6 Wend., 509; Jones on Pledges, Sec. 441; *Strong vs. Smith*, 80 N. Y., 637; Wood's Field on Corp., 99; 1 Abbott's Digest Corp., p. 309; Angell & Ames on Corp., Sec. 182; Morawetz on Corp., 360.

For the plaintiff it is claimed that the character of the holding of the stock by C. Brewer & Co. gave them the right to vote it, citing :

Bank vs. Case, 99 U. S., 631; *Burgess vs. Seligman*, 107 U. S. 20; *Pullman vs. Upton*, 96 U. S., 330; *Nat. Bank vs. Watson-town Bank*, 105 U. S., 217; *Crease vs. Babcock*, 10 Met., 545; *Rosevelt vs. Brown*, 11 N. Y., 149; *Trust Co. vs. Ins. Co.*, 18 N. Y., 199; *Nail vs. Hamilton*, 85 N. Y., 453; *R. R. Co. vs. Stewart*, 41 Pa. St., 54; *Hoppin vs. Buffum*, 9 R. I., 513; *Bank vs. Hingham M. Co.*, 127 Mass., 563.

In the great variety of cases involved in the foregoing citations, we believe there is no conflict of authority in respect to the proposition that a stockholding which carries with it a liability to the extent of unpaid balances on shares, gives with it a right to vote.

In *Burgess vs. Seligman*, 107 U. S., 20, it appears that by force of a Missouri statute exempting the holders of stock as collateral security from liability for the debts of a corporation, there might be a right to vote, although there is no liability corresponding, this right existing even on stock issued by the corporation as collateral security.

In *National Bank vs. Case*, 99 U. S., 631, the Court say, "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of the creditors. Having taken the legal title, he has released the former owner—he has taken the apparent ownership and thus become entitled to receive dividends, vote at elections, etc." In this case the responsibility was enforced on the defendant stockholders, although it had been transferred colorably to one of its clerks. The circumstances of the following case, much relied on by defendant's counsel, are substantially unlike the case before us.

Vowell vs. Thompson, 3 Cranch, 428, was a bill in equity to compel the defendant to give the plaintiff a power of attorney or proxy to vote at an election of directors upon 300 shares of stock transferred by the plaintiff in trust as a collateral security for a debt, the plaintiff being in no default and the stock not forfeited; *held* that until foreclosure or sale under the mortgage, the mortgagor is entitled to vote, and the Court will compel the mortgagee to give him a power.

In our case it is to be observed that the limited right to receive dividends by crediting the amount to the vendor's debit account was reserved by express agreement in the defeasance, but there is no stipulation reserving the right to vote.

We may ask for how long could it be considered that the right to vote remained with the vendor here. The terms of the sale were unconditional. The defeasance agreement, after reciting that the stock is sold and transferred in settlement of the debt of the company as to his personal liability, agrees to sell back within a year all stock which may remain in the hands of C. Brewer & Co. at cost and interest, but with the privilege of selling within the year a fraction less than one-half the shares. What interest remained in S. L. Austin? Clearly, no legal interest. He had only a right up to the first of October, 1885, to purchase an interest on certain terms, and he had not purchased. The question is not affected by the stock being paid up or not. Either kind of stock may be mortgaged, pledged or conditionally sold.

In case of a sale of partially paid stock made in the terms and with the conditions of this, it is clear that the purchaser and holder would be held liable for corporation assessments and debts, and that the vendor would not be looked to. Reason and authority are that the responsible party has the vote, and has it from the date of the transfer. The privilege of repurchase may not be exercised. Nothing remained to be done to vest the title of the stock in C. Brewer & Co.

Ex parte Willcocks. 7 Cowen, 411, is relied on by defendant's counsel as a leading case in support of his position. In our view it is directly adverse to it. The Court say, "Hypothecation is conventional and implies the power of rendering the subject

available by way of sale to satisfy the debt on default of payment. The stock stood on the transfer book in the name of the voters. This is generally conclusive upon the inspectors and we consider it so in this case. But we do not hesitate to say that in a clear case of hypothecation the pledgor may vote. The possession may well continue with him consistently with the nature of the contract and the stock remain in his name. Till enforcement and the title made absolute in the pledgee, he should be received to vote."

Barker's Case, 6 Wendell, 509, follows the same line, holding that hypothecated stock standing in the pledgee's name may be voted by him. To the same effect is Jones on Pledges, Sec. 441, and in all the authorities cited we find no support for the proposition that stock sold and transferred on the books can be voted by the vendor.

The legal title had passed. The legal time for repurchase had elapsed. Shares sold by Brewer & Co. would undoubtedly have carried the right to vote. The whole shares in the hands of Brewer & Co. must be considered to have the same right. One election of officers had been made under this right; the second, when the present officers were elected, was held after the lapse of the year during which it was agreed that S. L. Austin might buy back the unsold shares in the hands of Brewer & Co., at cost and interest. In our opinion, the right to vote was complete.

Upon the argument before us, Mr. Ashford, of the defendant's counsel, made a third proposition, viz: That as it appears that Messrs. Jones and Carter are officers of the corporation of C. Brewer & Co., whose interests are hostile to those of the Onomea Sugar Co., they were, and are still, disqualified from holding office in the Onomea Sugar Co.

It seems to us that our decision upon the above second point carries with it the decision on this point. If Brewer & Co. be considered the shareholders of all the stock in the company, how can they be considered as hostile to themselves. The ground of hostility or adverse interest must be taken to be that they were creditors of the company, and the sole creditors. Now, it must be considered that their interest was in the Onomea Sugar Co. being prosperous and valuable. Neither would this be an interest hostile to the vendor of the stock, for however valuable it might become,

he had the privilege of buying it back at cost, and if the management of C. Brewer & Co. made it worth less, he was under no obligation to take it. The cases cited in support are dissimilar to this in that they are not cases where the alleged hostile or adverse interest is the owner of the whole stock which might be affected by his dealings. We agree with the language of the Ohio case cited in Morawetz, Sec. 245: "A director whose personal interests are adverse to those of the corporation, has no right to be or act as a director—as soon as he finds that he has personal interests which are in conflict with those of the company he ought to resign." These directors had no interests hostile to the Onomea Company, and we think none hostile to the former holder of the stock.

Following the argument of Mr. Ashford, Mr. Thurston, as counsel for defendants, submitted argument, chiefly based on the proposition that defendants were in possession of the plantation claiming right of possession and should not be ejected by an *ex parte* injunction. An examination of the whole record does not sustain the premises of this argument. It is in proof in the case of *Stafford L. Austin vs. C. Brewer & Co.*, and in this case, that H. C. Austin was appointed manager of the plantation by the Directors of the Onomea Sugar Co., November 12, 1884. He has held as manager, drawn his drafts and exercised all the functions of a manager. He is not now, and never has been, the holder of stock in the company. In no view can he be considered as an adverse holder under claim of right and possession. The Court below had before it, as we now have in review, the whole pleadings and proofs in the several cases concerning these parties, and it was bound to consider them as affecting this particular case.

The petitioners made a sufficient showing that the defendants, being servants of the plaintiff company, were asserting claims and committing acts not in consonance therewith, which the plaintiff was entitled to have restrained by injunction.

We confirm the judgment of the Court below.

F. M. Hatch, for plaintiffs.

Ashford & Ashford and *L. A. Thurston*, for defendants.

Honolulu, March 12, 1887.

THE KING *vs.* AHO, *alias* YOUNG CHIN HOP.

EXCEPTIONS FROM CIRCUIT COURT, SECOND JUDICIAL CIRCUIT.

JANUARY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Officers of the customs cannot, without a search warrant, open merchandise brought from a port of entry in an inter-island steamer and landed in a warehouse at another port.

Defendant was convicted of obstructing an officer of the customs in the discharge of his duty; held, that as the officer had no search warrant, he was not in the discharge of his official duty; and a new trial ordered.

Held on re-argument, that officers of the customs can exercise their rights under the statute, as to search of goods without a warrant, only in regard to merchandise imported from a foreign country, before it has left the vessel at the port of first entry in this Kingdom.

OPINION OF THE COURT, BY JUDD, C. J.

THE defendant was found guilty at the December Term, 1885, of the Circuit Court of the Second Judicial Circuit, of the offense of obstructing a customs officer in the discharge of his duty.

On part of the prosecution, evidence was offered to show that on the 23d of July, 1885, one John Wagner was holding the office and discharging the duties of Port Surveyor of the port of Kahului, Maui, a port of entry; that on that day there were in the warehouse of Wilder & Co., at Kahului, (which warehouse, by permission of its owners, the customs officers used for customs purposes as occasion required) certain packages of merchandise which had arrived there from Honolulu on the steamer Lehua, the day previous, consigned to Chin Hop, at Kahului. On the 23d of July, while a Chinese trunk among these goods was lying in the warehouse, defendant came there and claimed delivery of the trunk, as agent of the consignee. Wagner, thereupon, as Port Surveyor, claimed and demanded of defendant the right to search the trunk and its contents. Defendant denied Wagner's

right to search, and by force and violence obstructed and prevented him from making such search.

On the part of the defense, evidence was offered to show that defendant took the trunk away by the consent of Wagner amicably obtained.

The defendant's counsel asked the Court to charge as follows :

"1. The duty of the customs officers is confined to a supervision of the exports and imports of the land. They are not authorized as such officers to institute a search of goods landed, even at ports of entry, from the ports of the other islands."

"2. Chapter LXX of the Penal Code, and section 11 thereof, under which this prosecution is brought, refers only to smuggling and other frauds against the revenue, and alludes only to such offenses as are committed in the importation of goods contrary to law. The authority of the customs officers does not extend to the search of goods held or possessed in violation of the police laws of the land, as the mere possession of opium;" which instructions were refused.

The Court charged, against the objections of the defendant's counsel, as follows :

"For the purposes of this case, I charge you that customs officers have the right of search at any port of entry to prevent smuggling, although my impression is that a port of entry is only a port of entry for goods requiring to be entered. In this case, I charge you that the customs officers at Kahului have the right to search goods imported from Honolulu by the inter-island carriers. Goods are liable to search even after they arrive in the Kingdom and transportation to other ports than those at which imported. It was Wagner's duty and right to search the goods in this case. If obstructed in that duty by more or less force on the part of defendant, then defendant is guilty of the offense charged against him and should be convicted. It is not necessary that an officer of the customs should first be informed or have cause to suspect that smuggling is being carried on or attempted. His right of search exists independent of any and all such information or suspicion, and may be exercised in his discretion."

BY THE COURT.

The several statutes which are considered by the Attorney-

General, representing the Crown, as conferring the authority upon officers of the customs to search and examine, without warrant, goods landed at ports of entry from inter-island carriers, are sections 554, 659 and 662 of the Civil Code. Section 554 prescribes that the collectors of the several ports shall be ex-officio inspectors, appraisers and examiners at their respective ports in all cases requiring inspection, appraisement or examination of goods or property coming in any way into such port, without invoice, or when undervalued or in any other case when the same may be deemed necessary by the collector.

This section is under Article 18 of the Code entitled "Of the arrival and entry of vessels," and section 545 requires a manifest to be furnished the collector by the commanding officer of every merchant vessel arriving from a foreign port, or from a domestic port with foreign merchandise on board. By foreign merchandise is meant, merchandise from foreign ports that has not been entered at a custom house. When goods have been entered and have passed the custom house, they become domestic goods, within the scope of this Article. No manifest is required of coasting vessels on arriving at any port. But it is not necessary to discuss this section further, as in the case before us the officer, whose examination of goods was resisted by the defendant, was not the collector of the port of Kahului, but the Port Surveyor, to whom this law does not apply.

Section 662 is especially relied upon by the prosecution. It reads:

"It shall be lawful for any collector or other officer of customs employed for the prevention of smuggling, or for any sheriff, constable or police officer to go on board any vessel when he shall have reason to suspect any goods subject to duty are concealed on board of such vessel, and upon producing his commission or appointment to office, to search for, seize and secure any such goods."

This section occurs under Article XXVI of the Civil Code, under the title "Of smuggling and other frauds against the revenue laws." These sections, presumably, apply to vessels from foreign ports.

But it is urged that a vessel from a foreign port might transfer

foreign goods to a coasting vessel outside of any of our ports, and unless the right of search of coasting vessels was allowed, the goods could be thus introduced without paying duty, and thus smuggling to a great extent could be engaged in with complete immunity. We think the law is full enough to cover such cases, for section 655 prescribes that all boats, vessels and craft of whatever description, in any way used or engaged in such smuggling, or attempt to smuggle, shall be forfeited. But the connection in the use of a coasting vessel under this law as auxilliary to a foreign vessel, to carry out smuggling, would have to be shown, and in such case the right of search would undoubtedly exist.

In the case before us, however, the goods were not attempted to be searched by the officers on board of any vessel. They had been landed from an inter-island steamer and no connection is sought to be established between her and a vessel bringing forfeitable goods from a foreign port. The goods had been landed and were in a warehouse of the steamship company, to which, by permission of the owner, the customs officers were allowed access and which was used for customs purposes as occasion required.

The Attorney-General contends that their status should be considered as the same as if still on board the vessel. The fact remains, however, that they were not then on board of any vessel, and the right to search for them without a warrant is not within the letter of the law. The warehouse, in this case, was near the shore, but the principle must be the same if it were miles inland; and to allow customs officers, without warrants, to search baggage and cases of merchandise all over the islands, miles away from the sea coast, and at any interval of time, would be intolerable and lead to great abuses.

Section 663 gives the necessary authority to officers of the customs, as also police officers, when the concealment of smuggled goods is suspected, to procure a search warrant and thus be entitled to enter any house or other place to make such search and break open doors, etc., if resisted. This should be followed in case of goods after they are landed. The law allows the arrest without warrant of a person charged with or suspected of the offense of smuggling or attempting to smuggle, and also the seiz-

ing of any specific article of merchandise liable to forfeiture anywhere on land or water, without warrant, by any person employed for the prevention of smuggling, or by any police officer; but we can find no authority for opening ordinary articles of merchandise after they are landed, not being baggage, by a customs officer or the collector himself, without a search warrant.

We are aware that there may be inconveniences arising from our construction of the law. Many of our ports of entry have been created of late years, and provision has not been made for the appointment of Magistrates to reside at these ports, to whom application can speedily be made for the search warrants when required. Some legislation may be found necessary to give officers, where the concealment of substances occupying but little space, like opium, is suspected, greater authority. We must remember that the Constitution, Article 12, provides that every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects, and we are not authorized to make this right of no value to the individual by enlarging the scope of statutes beyond their plain meaning and intentment.

Officer Wagner not being in the discharge of his official duty when the acts complained of on the part of the defendant took place, defendant should not have been convicted for resisting him, and the charge of the Court was erroneous, so far as it is contrary to the view now held.

The exceptions are sustained, and a new trial ordered.

Honolulu, March 8, 1886.

SUPPLEMENTAL OPINION, BY McCULLY, J.

After the above decision had been filed, the Attorney-General petitioned the Court for a rehearing, principally on the ground that the identity of the right to seize goods on board of any vessel, with the right to treat them in this warehouse *quasi* they were on the vessel, had not been fully presented in his former argument. The Court consented to hear another argument, desiring that the decision of a question of importance to the public service should be based upon consideration of every element of the case.

Upon further review of the statutes, we are unable to come to a different conclusion. Section 662 is placed among sections which relate to smuggling, which is defined in Section 655, the first in this article, as the importation, landing or transshipping of any goods subject to duty, without due entry, payment of duties, etc., at the Custom-house, and transshipment of merchandise from one foreign vessel to another was subject to transit duty, as per Section 562, until repealed in 1860 by an Act requiring still a permit from the Custom-house, under the penalties of smuggling.

Importation and introduction can mean nothing but bringing into this Kingdom from a foreign country, and transshipping can mean nothing but a transshipment from a vessel arrived from abroad to another foreign-bound. Section 661 provides that Custom-house officers may board and examine any vessel on her entry into and departure from this Kingdom. Section 662 provides that, for the prevention of smuggling, *i. e.*, the introduction of goods from a foreign port, customs officers and police officers may board any vessel, on suspicion of goods concealed on board, and after exhibiting their commission or appointment, search for, seize and secure such concealed goods.

To our apprehension, no other construction can be placed on the language of the section than that "any vessel" means a vessel from a foreign port. Not only does the whole context show this, but the inference to be drawn from the provision that the officer exhibit his commission or appointment to office. For surely it cannot be intended that a police officer, having a duty to execute on an inter-island vessel, must produce his commission. And it would be a perversion of language to hold that a package which has been landed and placed in a warehouse, which is also used as a Custom-house store, is concealed on a vessel. This section has a plain, obvious meaning, and all rules of construction require this to be given. It means there is authority given to search a vessel for concealed goods. It fits the case of a vessel suspected of having made a fraudulent or defective manifest. She may have discharged everything as reported, and lie in port as a discharged ship, ostensibly waiting cargo, but also waiting the opportunity to smuggle her concealed goods. She may be searched.

The next section, 663, provides for search, but under a search warrant, for goods suspected to be smuggled and concealed anywhere on shore. Sections 554 and 555 provide for inspection and examination of goods. Other sections provide for seizure and forfeiture of baggage, which has been fraudulently declared on.

The Attorney-General is necessarily obliged, for consistency's sake, to take the view that merchandise once introduced into the country, upon being placed aboard an inter-island vessel, again assumes the character of foreign cargo, and becomes amenable to what may be called the summary jurisdiction of the Custom-house. It seems to us that consistency would require to proceed a step further, and hold that the whole cargo be manifested and entered again at the port or ports of entry where it is discharged, which is a *reductio ad absurdum*.

Our decision stands as first rendered.

The *Attorney-General*, for the Crown.

Ashford & Ashford, for defendant.

Honolulu, March 25, 1886.

W. H. SHIPMAN vs. JOSEPH NAWAHL.

EXCEPTIONS FROM RULINGS OF McCULLY, J.

JANUARY TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

The Ill of Piopio, being an *ili kupono*, is not subservient to the ahupuaa of Waiakea, by which it is surrounded; and the lessee of the Ill of Piopio has no rights, as a *hoaaia* of the ahupuaa of Waiakea, in the sea fishery appurtenant to Waiakea.

But it appearing, for the first time in the Appellate Court, that the lessee of Piopio has also a kuleana in Waiakea; held that said lessee, defendant herein, has a good defense to an action by plaintiff, the owner of Waiakea, for damages for breaking and entering the sea fishery of Waiakea.

New trial ordered; costs to be paid by defendant, as it was through his laches that the case was left to the jury.

OPINION OF THE COURT, BY PRESTON, J.

This is an action of trespass, wherein the plaintiff claims \$2,500 for alleged damages occasioned by the defendant's breaking and entering the sea fishery of the plaintiff, adjoining and appurtenant to the plaintiff's land, called Waiakea, Hilo, Hawaii, and taking fish therein.

At the trial, before McCully, J., and a mixed jury, who rendered a verdict for plaintiff for \$875, at the July (1885) Term of this Court, the defendant claimed a right of fishing as a *hoaina* in the Ahupuaa of Waiakea, basing his claim as a lessee of the Ili of Piopio.

496. The Court held that, as the Ili of Piopio was an *ili kupo*, it was a separate and independent title, and not subservient to the ahupuaa, so that the owner of Piopio was not a tenant of Waiakea, and the fact that Piopio was surrounded by Waiakea did not make it a part thereof, and instructed the jury that there was not evidence to support the defendant's claim.

Exceptions were duly taken to this ruling, as well as to other rulings made by the presiding Judge during the trial, and the bill of exceptions was argued before us on the 18th of February last, as of the January Term.

From the circumstances hereafter appearing, it appears to us to be unnecessary to decide the several exceptions, some of them of considerable importance, except so far as to say that we are of opinion that the instructions and ruling of the learned Judge, with regard to the rights of the defendant under his lease of the Ili of Piopio, were correct.

But, on referring to the said lease, we find that, in addition to the Ili of Piopio, a kuleana in Waiakea, described as: "2. The 'Halai' kuleana, as described in Land Commission Award numbered 1279, on Waiakea," is comprised in the demise. This was not brought to the attention of the Court or jury on the trial, nor to us on the arguing of the exceptions. It is clear that this changes the whole aspect of the case, and shows a good defense to the action.

We therefore think a new trial should be had, and so order. The costs of the previous trial and of these exceptions must be

paid by the defendant, as it was through his laches the case was left to the jury.

L. A. Thurston, for plaintiff.

P. Neumann and *W. A. Kinney*, for defendant.

Honolulu, March 16, 1886.

IN THE MATTER OF JOHN W. MCCARTHY.

EXTRADITION FROM CALIFORNIA.

FEBRUARY, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

There can be no question of the right of the Government, independent of any treaty, to surrender a fugitive criminal upon the request of a foreign State.

Upon a requisition from the Governor of California for the surrender of a fugitive from justice, the Minister-Resident of the United States in this Kingdom requesting the intervention of this Government: held that the objection that the Governor of a State has no power, under United States laws, to make such a requisition, is not sustainable in this case.

The production of an indictment against the fugitive, found by a Grand Jury, charging the crime alleged, is a sufficient presumption of guilt.

Although it would have been more regular to forward the original bench warrant, a certified copy thereof, issued under the seal of the Court, held sufficient.

It being sufficiently proven that the respondent is a fugitive from justice, the Court grants extradition, notwithstanding that embezzlement, the crime of which he is charged, is not extraditable under provisions of any treaty.

OPINION OF THE COURT, BY PRESTON, J.

On the 25th day of January last, an information was laid by the Attorney-General before the Chief Justice, alleging that John W. McCarthy was guilty of the crime of embezzlement, as

a public officer (Clerk of the Supreme Court of the State of California), and that the Grand Jury for the city and county of San Francisco had, on the 15th day of January, found a true bill of indictment in the Superior Court of said city and county against the said McCarthy for such crime, and that a warrant had been issued from the said Court for the apprehension of the said McCarthy, and that said McCarthy had left San Francisco, and was then residing in Honolulu, and that a requisition for the surrender of the said McCarthy, under the hand of the Governor of the State of California and the Great Seal of the State, had been sent to His Majesty's Government, and praying for an order from the Chief Justice for the arrest of the said McCarthy, in order that he might be delivered to the officer sent to receive him.

The Chief Justice thereupon caused a warrant to be issued, under which McCarthy was arrested and brought before His Honor, on the 26th.

The Attorney-General appeared on behalf of the prosecution.

Mr. Whiting appeared for the prisoner and pleaded to the jurisdiction on the grounds:

1. That the warrant issued sets forth no crime or accusation of crime
2. That the crime for which extradition is sought is "embezzlement," and that "embezzlement" committed in a foreign country, viz., the United States, is not an offense or crime for which the person can be extradited.
3. That the demand for extradition is made through the Governor of the State of California, and that there is no authority in law for said Governor to make such demand.
4. That the affidavit and complaint are made by the Attorney-General of this Kingdom, and the Attorney-General cannot properly or legally make such complaint or be complainant herein.

The Chief Justice overruled the pleas, and on February 1st the case came up for hearing and evidence was introduced. It consisted of

1. A request by George Stoneman, Governor of the State of California, attested by the Secretary of State of California, under the Great Seal of the State, dated the 16th of January, 1886, to "His Royal Highness the King of the Hawaiian Islands," for

the apprehension and delivery to one Joseph Bee, who is duly authorized to receive him, of one John W. McCarthy, who stands charged with the crime of embezzlement, committed within the county of San Francisco.

2. Copy of an Indictment in the Superior Court of the City and County of San Francisco, State of California, against the said John W. McCarthy, in which he is accused by the Grand Jury of the City and County of San Francisco, with the crime of embezzlement, in that he was, on or about the 28th day of February, 1885, the duly elected, qualified and acting Clerk of the Supreme Court of the State of California, and, by virtue of his trust as such officer, there came into his possession and control (\$550) five hundred and fifty dollars of the property of the State of California, and which he, at the City and County of San Francisco, on the 28th of February, 1885, willfully, unlawfully, fraudulently and feloniously did appropriate to his own use, contrary to the due and lawful execution of his said trust, and contrary to the form, etc., of the statute, etc. This is signed by J. N. E. Wilson, District Attorney, endorsed a "True Bill" by E. M. Burns, Foreman of the Grand Jury, and certified by Jas. J. Flynn, the Clerk of the Superior Court, as having been presented in open Court by the Foreman of the Grand Jury, and filed as a record of said Court on the 15th of January, 1886.

3. Copy of a bench warrant issued on the indictment by order of the Court and attested by Jas. J. Flynn, the Clerk, dated the 15th of January, 1886, for the arrest, forthwith, of the said John W. McCarthy.

4. Original affidavit or return of William Broughton, a police officer of the City and County of San Francisco, that he received the annexed warrant for the arrest of John W. McCarthy and that he made diligent search for him, etc., and avers upon information and belief that he has fled from justice in the State of California, and has taken refuge in the Kingdom of Hawaii. This is sworn to before a Deputy Clerk of the Superior Court.

These three last papers, to wit, the indictment, bench warrant and affidavit of William Broughton, are certified to by Jas. J. Flynn, Clerk of said Superior Court, under the said seal of the said Court, as a full and complete exemplification of the papers

and proceedings in the case of *The People of the State of California vs. J. W. McCarthy*. The genuineness of this certificate and signature is attested by M. A. Edmonds, Presiding Judge of the Superior Court of the City and County of San Francisco, and this is in turn certified to and authenticated by Jas. J. Flynn, Clerk as aforesaid. The genuineness of the seals and of the signatures of Judge Edmonds and Jas. J. Flynn, the Clerk, were proved to the satisfaction of the Chief Justice by competent evidence. The testimony of Joseph Bee, a police officer of the City and County of San Francisco, was taken, that he knew the John W. McCarthy, then in Court, to be John W. McCarthy, who was in February, 1885, Clerk of the Supreme Court of the State of California, and who is charged in the indictment with embezzlement of public funds. Evidence of the statutes of California as to the constitution and jurisdiction of the Superior Court of California, the functions of the Grand Jury, the nature of an indictment found by it, the nature of the crime of embezzlement, etc., was also given.

The Chief Justice rendered his decision (which is on file) on the 4th of February, and thereupon certified to His Majesty's Minister of Foreign Affairs, that

"The Chief Justice now finds that the above named John W. McCarthy is charged with the crime of embezzlement committed by him as a public officer of the State of California, and entrusted with the custody of public funds belonging to said State while such officer :

"That said crime constitutes a felony by the laws of said State of California and is a crime within the meaning of section 449 of the Civil Code of the Hawaiian Islands :

"That the evidence adduced on the hearing aforesaid is sufficient to sustain the charge made against the said John W. McCarthy, and that the said John W. McCarthy is a fugitive from justice."

On the receipt of this certificate the Minister of Foreign Affairs issued his warrant for the arrest and surrender of the accused.

The accused having been arrested, he applied to Mr. Justice Preston, in Chambers on the 5th inst., for a writ of *habeas corpus*,

which was granted, and on the same day the accused was produced before such Justice and his detention justified under the Minister's warrant. At the request of the parties, the Judge discharged the writ *pro forma* in order that an immediate appeal might be taken, and the accused was remanded in custody.

The appeal came on for hearing on the 6th inst., and was argued by Mr. Whiting for the appellant and the Attorney-General *contra*.

The following points were taken by counsel for the appellant:

"1. That the State of California is not a sovereign power, and, therefore, this Government cannot recognize its demand for petitioner's extradition.

2. Our treaty and intercourse is all with the United States, and no person can or should be delivered up to the officers of any of its component parts, unless the demand therefor be made by the Government of the United States at Washington.

3. The papers upon which the demand is made are in themselves insufficient to warrant a delivery upon a demand from Washington, and *a fortiori* from California, in this, that the paper purporting to be a bench warrant is not issued under the seal of the Superior Court of the City and County of San Francisco, and is, therefore, void there and everywhere.

4. That the crime of embezzlement is not one mentioned in the treaty, and, even if the demand were made by the Government of the United States, this Government should not give up petitioner because the maxim, *enumeratio unius est exclusio alterius*, applies to a treaty.

5. That there is no evidence to warrant his arrest and delivery under our law.

6. That there is no evidence that he is a fugitive from justice, and, therefore, he should not be delivered up, as only fugitives from justice can be so delivered.

7. That this Government can only deliver up petitioner to the properly authorized agent of the United States of America, and Joseph Bee, who is named in the warrant, has no authority whatever from that Government.

8. The Court on *habeas corpus* cannot enquire into the exercise

of executive discretion when the right of personal liberty is involved.

9. This Government is not observing a due respect to the United States when it treats one of the States in all respects as though it were a sovereign power.

10. From the warrant of arrest and the affidavit of the Attorney-General it appears that the crime alleged to have been committed by John W. McCarthy, for which he is sought to be extradited, is that of "embezzlement." That embezzlement committed in a foreign country, viz., the United States, is not an offence or crime for which John W. McCarthy can be extradited.

11. That the demand for extradition is made through the Governor of the State of California. That there is no authority in law for said Governor to make this demand."

The case was elaborately presented by the learned counsel, and the following authorities *inter alia* were cited in support of his contentions :

Bishop's Cr. L., Sec. 23, 196, 25; *U. S. vs. Lancaster*, 2 McLean, 431; *Cohen vs. Virginia*, 6 Wheat., 264; Spear on Extradition, pp. 5, 116, 117, 195, 196, 383, 51; Opinions of Atty. Genl., Vol. 7, p. 6, Vol. 6, pp. 91, 85, 431; *Holmes vs. Jennison*, 14 Peters, 540; *The People vs. Curtis*, 50 N. Y., 321; *Respublica vs. Longchamps*, 1 Dall. 120; *Re Wong Sow*, 3 Hawn., 503.

A treaty is a supreme law of the land.

Foster vs. Nelson, 2 Pet., 253; Wheat. Int. Law, 93, 94; *Short's Case*. 10 Serg. & R., 134; *In re Washburn*, 4 Johns. Ch. 106; Remarks of Taney, C. J., in *Rhode Island vs. Massachusetts*, 14 Peters, 458.

The Attorney General contended that the Hawaiian Government might, under the authority of section 449 of the Civil Code and by International Law, although not bound to do so, surrender the accused, notwithstanding "embezzlement" was not a crime included in the Treaty with the United States.

BY THE COURT.

The first point we have to consider is, whether the Minister of Foreign Affairs has authority by law to issue his warrant to surrender the petitioner.

It is a disputed question among writers on international law as to how far a sovereign state is *obliged* to deliver up persons charged with the commission of crime in a foreign country. But it is nowhere held that the Government of a sovereign state may not, in its discretion, deliver up such fugitives from justice on requisition made by a friendly government.

If there be a treaty, of course the contracting states are bound to deliver up persons accused of the commission of crimes mentioned in the Treaty, but it does not, in our opinion, follow that states are precluded from surrendering persons accused of other crimes than those specified.

The Treaty between this Government and the United States was ratified in August, 1850, and by it the contracting powers mutually agreed to surrender, upon official requisition, to the authorities of each, "all persons who, being charged with the crime of murder, piracy, arson, robbery, forgery or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the Territories of the other."

In the case of Anson Wing, the opinion of the Attorney-General (Cushing) was cited by counsel for petitioner. The Attorney-General says: "It is the settled politic doctrine of the United States that, independently of special compact, no State is bound to deliver up fugitives from justice of another State." "It is true, any State may, in its discretion, do this as a matter of international comity towards the foreign state, but all such discretion is of inconvenient exercise in a constitutional republic, organized as is the Federal Union," etc. And similar opinions have been given by other Attorneys-General of the United States, and there is no doubt that the practice of the Government of the United States and of Great Britain has, in general, been in accordance with the policy stated by Mr. Cushing.

But in the case of Arguelles, the Government of the United States did seize and surrender to the Spanish Government, with which there was no extradition treaty, the person accused of crime. It is true Mr. Spear (p. 16) says it was nothing but legal kidnapping, but the Government exercised its discretion.

But the case under consideration stands, as we think, on higher grounds than any previously mentioned.

The Legislature of this Kingdom, by one of its first laws, after the recognition of its independence and sovereign rights, adopted the principle that it is the duty of the State to surrender fugitives from justice. By Article IV, Section 1, of the second Act of Kamehameha III, "An Act to arrange the Executive Departments of the Hawaiian Islands," it is enacted :

"The Governors, upon receiving information from the Minister of the Interior, that any person, an alien, fleeing from the justice of a foreign country on account of crime committed therein, is lurking in their respective islands, evading justice, and that formal demand has been made for his surrender by the representatives of such foreign country, or in case no demand has been made, that a public proclamation has been issued against such fugitive, and a reward offered for his apprehension and surrender, shall have power, and it shall be their duty, to issue a warrant for his or her apprehension."

By a subsequent part of the same Act, relating to the office of the Minister of Foreign Relations, it is enacted :

"The Minister of Foreign Relations, upon information in writing from the Minister of the Interior, that an alien fugitive from justice has been arrested within the jurisdiction of this Kingdom, and is in custody of the Marshal, pursuant to Section 8, Article 4, Chapter 4 of the first part of this Act, shall give immediate notice of such arrest to the accredited representative of the nation to which said fugitive belonged, if there be one near this Government; and he shall, through such representative, tender such fugitive to the nation whose subject or citizen he is; claiming, at the same time, the costs and expenses incurred by his apprehension, removal, confinement and surrender."

The statute also provides that in case the accredited representative shall decline to accept the surrender, the fugitive may be expelled the Kingdom. The policy of the Government being to deny the right of asylum to criminals.

The Civil Code was compiled and became law in 1859, and by it the following clauses were substituted for those before set out:

"Sec. 449. The respective judges and magistrates of the Kingdom shall have authority upon complaint made under oath to issue a warrant for the apprehension of any person charged

with the commission of a crime, in any foreign country, that he may be brought before such judges or other magistrates respectively to the end that evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the Minister of Foreign Affairs, that he may issue a warrant for the surrender of such fugitive."

"Sec. 451. The warrant of the Minister of Foreign Affairs, directing the surrender of any fugitive from justice, shall be binding upon all officers of His Majesty's Government, in anywise having the custody of such fugitive."

"Sec. 452. Every fugitive from justice may be retained in prison after his surrender, until a suitable opportunity occurs for his removal, at the expense of the officer to whom he is surrendered."

So that, it appears to the Court, there can be no question as to the right of His Majesty's Government to surrender a fugitive criminal.

And indeed a very distinguished living statesman (P. S. Mancini) maintains that "the duty of surrendering such fugitives is founded in natural right as a debt due to justice, and consequently does not depend for its existence either on the fact of a treaty or on the condition of reciprocity." See *American Law Review*, November-December, 1885, p. 955.

The Legislature having, according to our view, provided for the surrender of such fugitives, and His Majesty's Government having exercised its discretion, by the Minister of Foreign Affairs issuing his warrant for the surrender of the petitioner, it is not within our province to review the exercise of such discretion, except so far that we must see there is a proper legal basis to sanction the act of the Minister, and this brings us to the consideration of the remainder of the points urged on behalf of the petitioner.

The requisition is made by the Governor of the State of California and it is contended he has no power to make such a requisition by the Laws and Constitution of the United States.

However this may be, and without binding the Court to decide

as we now do in any case which may hereafter come before it, we hold, in the case now before us, that the Minister Resident of the United States having requested the intervention of His Majesty's Government, the ground taken for the petitioner is not sustainable.

With respect to the points touching the want of evidence to warrant the arrest of the petitioner, we are of opinion that if the petitioner was charged with the crime before a magistrate having power only to commit the accused for trial and to issue his warrant for the arrest of the accused for examination, the evidence would undoubtedly be insufficient to make even a *prima facie* case, and the petitioner would be entitled to his discharge. But here an indictment has been found by a Grand Jury, from which we must assume that sufficient evidence was adduced to warrant the placing of the petitioner upon his trial.

Article 7 of our Constitution, as to the right of an accused to have witnesses against him produced face to face, only applies to persons put upon their trial upon indictment before the Courts of this Kingdom.

It is enough that a reasonable presumption of guilt is apparent and the production of an indictment found charging the crime is sufficient. (Spear, p. 291.)

With regard to the sufficiency of the bench warrant, we think it would have been more regular to have forwarded the original; but the copy is certified by the proper authority, and it purports to be issued under the seal of the court, and we think that the objections are not well taken.

The only remaining point is whether the petitioner is a fugitive from justice. The petitioner claims that by the law of the State of California (Political Code, Sec. 853) he is entitled to be absent from the State for sixty days, and that consequently he is to be treated, not as a fugitive from justice, but as a person lawfully traveling wherever he may please.

We cannot adopt this view, and we think the authorities of the State of California have repudiated such a construction by taking the measures they have. The affidavit of the officer entrusted with the warrant for the arrest of the petitioner is distinct and specific. He says "sought for him at his last known

place of residence and at his place of business and in the market place and at the exchange, and that he could not find the said J. W. McCarthy; and deponent deposes and avers upon his information and belief that the said J. W. McCarthy has fled from justice in the State of California and taken refuge in the Kingdom of Hawaii." We therefore are of opinion, it is sufficiently proven that the petitioner is a fugitive from justice.

We therefore dismiss the petition and remand the petitioner to the custody of the Marshal. Costs to be paid by the petitioner.

BY JUDD, C. J.

In addition to the opinion of the Court I wish to say that as the crime charged against the prisoner, embezzlement of public funds in a foreign country, is not one of the crimes for which by the treaty between the United States and this Kingdom his extradition could be demanded, the procedure to obtain his surrender is not to be governed by the provisions of the treaty. It is quite true that if the surrender of a fugitive should be demanded as of right under the treaty, this Government would be justified in refusing to comply with it, unless the demand came from the Executive representing the sovereignty of the foreign State.

In the case before us the request of the United States Minister that the prisoner be surrendered to the agent of the State of California is sufficient. The liberty of residents in this Kingdom is fully protected by the statute law which requires a judicial examination into the proof of criminality against them and a judgment as to its sufficiency as a prerequisite to their being excluded from this Kingdom. If it were not for this statute, and a resident of this Kingdom was attempted to be sent abroad to be tried for a crime not extraditable under a treaty, the act of the Executive in arresting him and holding him for surrender would be without law. In such a case the Court would be authorized to interfere by Habeas Corpus.

The policy of this country as evidenced by the statute of 1846, which authorized the arrest of an alien fugitive from justice, and his tender to the accredited representative of the country to which the fugitive belongs, though no demand for his surrender be made, and the present statute passed in 1859, is certainly against making

our shores the asylum for foreign criminals. Many of the dicta quoted from cases in Courts of the United States where the policy is said to be against the surrender of fugitives except under treaty obligations, would have no application here.

BY McCULLY J.

The eleven points made by the learned counsel for the petitioner cover everything that can be urged on his behalf. But in my view he seriously misapprehends the status of the case with reference to Article XIV of the American treaty, and with reference to treaty stipulations generally.

It is seen by the citations made in the opinion of the Court from the organic laws of 1846, the first systematic laws of this Kingdom, that a full and liberal provision was made against the contingency that the Island Kingdom might become a resort for fugitives from justice. Such might be arrested upon merely the formal demand of a resident foreign representative, or further, upon the mere knowledge that public proclamation had been issued against a fugitive, and be held in custody of the authorities until surrendered to the representative of the foreign government from whose jurisdiction he had fled. These statutes contain no provisions for judicial examination of the grounds for issuing a warrant. The order proceeds immediately from the executive. Furthermore, so careful was the legislation of that time that persons guilty of crime in other countries should not sojourn here, that it is provided that even if the representative of the foreign power refuses to accept the surrender, the offender may be delivered up for transportation, to any armed vessel of his nation.

These provisions of law were made prior to any treaty stipulations concerning extradition, although treaties recognizing the sovereignty and civilization of the Kingdom had been made with France and Great Britain.

The statutes of 1846 being the law of the Kingdom, the Treaty with the United States, embracing Article XIV, providing for extradition, was ratified in August, 1850. There are obvious reasons why the Treaty should be narrower in its terms than the Hawaiian statute. It was of reciprocal obligation, binding the United States to restore like offenders upon like terms to the Hawaiian Government.

It is a universal rule in extradition treaties to specify the extraditable offenses. What is agreed upon becomes obligatory and the claim is of right, not depending upon international comity nor upon the statutes of the State upon which the demand is made. The United States could have entered into no treaty giving extradition in the broad terms of the Hawaiian statute of 1846, while there were very good reasons of policy for this Kingdom to offer the statute to the powers of the world, and there could be no implication that the American treaty curtailed the effect of it by specifying the offenses for which the United States would extradite to Hawaii, and *vice versa*.

In this state of law and treaty, the Civil Code, repealing and superseding the Acts of 1846, was passed May, 1859. Section 449 specifies no offenses. "A crime" is the only designation of the subject on which the statute moves. The mode of proceeding only is changed. There is no appearance of modification due to the American Treaty, which had been in operation nearly ten years. The wise policy of maintaining a statute which would surrender to the justice of foreign powers a wider class of offenders than was stipulated by treaty appears to have still obtained. Enacted after the treaty, it is independent of it, and I see no reason to hold that the treaty abridges the law. This view disposes of one series of the petitioner's objections.

As to the form of the demand. Undoubtedly the State of California cannot maintain diplomatic relations with this or any other foreign power, unless, which I am not informed about, she is included among the States which the Republic of Mexico, by treaty with the United States, permits to make extradition demands directly upon her. But here the United States Minister adopts and presents this request, which is not a demand,—only treaty stipulations being demandable—that this Government will put in operation its own statute. In this view, it seems to me nothing more is needed. Indeed the statute requires only "complaint made under oath" before any magistrate by whomsoever may be credible and have a proper relation to the case, to put it in motion. Query: Why could not officer Bee, without the request of the Governor of California, and without the request of the United

States Minister, have demanded a warrant for the apprehension ? These requests, the one and the other, are highly influential, but I do not perceive that they are essential to the operation of the statute. The authority of officer Bee to receive him without special authorization is, however, a different thing from making the complaint.

Now, was the evidence of criminality sufficient to sustain the charge. Doubtless this Court, upon review in *Habeas Corpus* of the sufficiency of evidence, will be held by all the constitutional provisions guaranteeing the rights of personal liberty and of trial upon evidence of witnesses produced face to face, both for the defense and prosecution, which rights belong to all persons being for any time within our jurisdiction.

Without referring to the authorities given in the opinion of the Court, I cite only the result expressed in Spear's Law of Extradition, p. 40, in these words, "The general rule of evidence adopted in the extradition treaties of the United States is, that the charge of criminality on which the demand for delivery is based must be supported by such evidence as would justify the apprehension and commitment for trial of the person accused, if the alleged offense had been committed in the country on which the demand is made." This rule as to treaties may be adopted for action under our statute. We have before us in this case evidence of criminal proceedings commenced in the Court of California. An indictment has been found by at least twelve grand jurors acting upon sworn testimony. A bench warrant has issued thereon for his arrest, and the service thereof has been defeated only by the departure of the petitioner from the country. The case has reached the stage of probable cause and apprehension already in California. "Evidence of criminality" required by Section 449 cannot be taken to mean conviction of guilt. Mr. McCarthy is not to be tried here. He is wanted to be tried in California. The proofs offered here satisfy me that there is no infringement of personal right in rendering him for such trial. On the other hand it would be unreasonable to require more. There is a clear distinction between a mere charge or accusation and a commitment or indictment found. If there were only the first, it would be proper to require here evidence of probable cause on

which a commitment for trial might be made. We are certified that this has already been done. If our statute does not apply to this case it is not easy to see what it was intended to accomplish.

Regarding the jurisdiction of the Court to inquire into the discretion of the Executive in this proceeding it seems to me that when we have determined that the issue of the certificate to the Minister of Foreign Affairs was well based on the statute, we have done all that belongs to us. Upon such certificate given we are not to advise him to issue his warrant, and certainly are not to advise him not to issue it.

W. H. SHIPMAN *vs.* JOSEPH NAWAHL.

TAXATION OF COSTS.

APRIL TERM, 1886.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

Defendant was ordered to pay costs for his laches; plaintiff claims \$206, for costs of witnesses; the Court allows \$105 of this amount to be taxed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS Court, on the 16th March, 1886, ordered a new trial and said "the costs of the previous trial and of these exceptions must be paid by the defendant as it was through his laches the case was left to the jury." Counsel for plaintiff filed affidavits claiming to be repaid disbursements for witnesses, etc., amounting to \$206. The question comes to the full Court, by agreement, whether the defendant should pay all or any of these costs. Counsel for defendant say that these affidavits were filed since the decision of March 16, and the Court could not have contemplated that the defendant should pay this large sum, (\$206) by way of penalty for his laches.

We think the amounts covered by the affidavit of the 20th April are reasonable and proper to be paid by defendant, less the

two dollars for stamps. Twenty-six dollars on this affidavit may be taxed.

On Shipman's affidavit of April 18, we allow for mileage (or passage money) of J. K. Akina, twenty-five dollars; and one dollar for attendance, one day, the trial occupying two days, and one dollar a day for five witnesses being allowed on the affidavit of April 20, which we presume includes the attendance of Mr. Akina for one day.

For P. A. Akau, the same, *i. e.*, twenty-six dollars.

For Elemakulu, Kauhiolaie and Kukahi, we allow for passage money, four dollars each way, for each of them, and one day's attendance each, or nine dollars for each witness; in all, twenty-seven dollars. These items amount to \$105; and this the defendant must pay.

BOARD OF IMMIGRATION *vs.* JOSE DE REGO SOUSA.

PUALANI *vs.* J. NAKALEKA.

B. H. KAHANANUI *vs.* C. K. KAPULE.

APPEALS FROM CIRCUIT JUDGES.

APRIL TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Chap. XXVI, Laws of 1884, limits appeals from a Circuit Judge at Chambers to the Circuit Court of the same Judicial Circuit.

OPINION OF THE COURT, BY JUDD, C. J.

THE first of these cases was heard on appeal by Hon. Circuit Judge Hart, of Hawaii, and an appeal taken to the Supreme Court. The other two were heard on appeal by Hon. Circuit Judge Fornander, of Maui, and appeals taken to the Supreme Court.

All these appeals are without the authority of law.

The last Legislature passed an Act, being Chapter XXVI of the Session Laws of 1884, which limits appeals from a Circuit Judge at Chambers in all cases, civil or criminal, to the Circuit Court of the same judicial district. If the case should arise on Oahu the appeal may be taken to the Supreme Court.

We regret that the attention of attorneys and courts and the public has not been sufficiently drawn to this law, and that appeals are still being taken to the Supreme Court from the decisions of the Circuit Judges.

We are obliged to dismiss the several appeals in the above cases as being without jurisdiction.

Mr. Dole, for defendant in the first case.

Honolulu, April 21, 1886.

LAM YIP *vs.* CHING SING *et al.*

APPEAL FROM POLICE JUSTICE OF HONOLULU.

APRIL TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

- Ching Sing made an assignment for benefit of creditors; plaintiff, a creditor not included in the schedule given to the assignee by the debtor, sued Ching Sing, making the assignee a garnishee:

Held, affirming the judgment of the Court below, that the assignee became a trustee for the creditors, and could not be ordered to satisfy plaintiff's claim: the validity of the assignment can only be attacked if proceedings in bankruptcy are taken.

OPINION OF THE COURT, BY PRESTON, J.

ON appeal from the Police Court, Honolulu.

This is an action of assumpsit brought in the Police Court, Honolulu, to recover the sum of \$119 67, balance due on a promissory note.

J. E. Wiseman was served with a summons as a trustee of the debtor, Ching Sing.

The garnishee attended, and gave the following testimony :

"I know Ching Sing; I have no money or property in my possession; his creditors came to me with him; at his request I was made assignee; he assigned to me all his property—a one-tenth interest in a garden at Waikiki; this is the assignment; I have not disposed of this property; it was advertised for sale yesterday; the price was not high enough, and it was not sold; I was offered \$250 for it at auction."

The deed is dated 24th February, 1886, and is an assignment to Wiseman, in trust for the benefit of the creditors of the debtor mentioned in schedule.

The plaintiff's name does not appear in the schedule.

The Police Magistrate rendered judgment for the plaintiff, and discharged the garnishee.

The plaintiff appealed from the judgment discharging the garnishee upon the following grounds:

That no conveyance between the defendant, Ching Sing, and the said garnishee could bind the plaintiff, but that the property in possession of Wiseman was and is liable under the process herein.

April 20, V. V. Ashford for plaintiff. Wiseman is not released as garnishee by the deed from the claims of creditors who were not consenting parties to the trust; especially as the money or property had not been paid or distributed at the time of the service of the garnishee process.

If there were circumstances under which the trust deed was good they could not be held to extend beyond a trustee process or garnishee; and in any event an assignment (whether purporting to be "in trust" or otherwise) would be invalid if it operated to the benefit of one or more creditor or creditors to the detriment of the others.

The assignment in trust by the general rule of law cannot interfere with the rights of creditors who do not choose to be bound thereby. There is no privity on the part of this plaintiff, and his legal rights as they would exist *without* the alleged deed of trust, cannot be taken from him by strangers and without process;

which would be the effect if the deed were held to be valid against the plaintiff.

Chandler vs. Booth, 11 Cal. 342 was cited.

No counsel appeared for the respondent.

BY THE COURT.

We are of opinion that the judgment appealed from is correct.

An assignment to a trustee for the benefit of creditors not parties to the deed is valid without the assent of the creditors, and the legal estate will pass to the assignee without such assent, so as to prevent a judgment creditor from obtaining a lien by execution.

See *Nicoll vs. Mumford*, 4 Johns., Ch. 522.

The property having passed to Wiseman, he became a trustee for the creditors, and not for the debtor, and consequently could not be ordered to satisfy the plaintiff's claim.

The deed cannot be attacked by these proceedings, and although it may be invalid as an act of bankruptcy, that question can only be considered if proceedings in bankruptcy are taken.

The appeal is dismissed with costs.

Ashford & Ashford, for plaintiff.

Honolulu, April 28, 1886.

NAKUAIMANO vs. ACHOL

MOTION TO DISMISS EXCEPTIONS.

APRIL TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Under Rule of Court VIII, on exceptions from order denying or granting motion for new trial a bond for further costs must be filed within ten days.

Exceptions dismissed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS case began in the District Court of Walalua, Oahu, and

came by appeal of plaintiff to the Intermediary Court of Oahu, thence by appeal of plaintiff again to the Supreme Court with a jury at the January Term, 1886. The jury rendered a verdict for plaintiff. A motion for a new trial, on the ground that the verdict was contrary to law and evidence, was heard and denied by the presiding justice. Defendant entered his exceptions and his bill was allowed.

Plaintiff now moves that the exceptions be dismissed on the ground that they were not properly perfected.

BY THE COURT.

The rule of Court (new rule VIII, March 12, 1885,) reads: "Any person excepting to the ruling of the justice, denying or granting the said motion (for a new trial on the ground that the verdict is contrary to law and evidence) must present his bill of exceptions to the said justice for allowance within ten days from the rendition of such ruling, by paying costs and giving bond for further costs," etc.

The bond thus required was not filed.

Counsel for defendant show the Court the bond filed by him to perfect the motion for a new trial before the single justice. This bond is to the plaintiff and it conforms to the former part of the rule, being conditioned not to dispose of his property to the detriment of the plaintiff, and it provides for the payment of all the costs to accrue. But it is not the bond required by the rule, which should be to the Clerk of the Court for the further costs to accrue. A new bond is required by the rule by the party failing before the single justice.

The exceptions are dismissed.

Kinney & Peterson, for plaintiff.

Ashford & Ashford, for defendant.

Honolulu, April 27, 1886.

JOSEPH TINKER vs. R. H. GRAHAM.

SUBMISSION BY STIPULATION.

APRIL TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

An agreement between Defendant and H. Barber held not to estop Defendant from denying his liability to Plaintiff for goods supplied to Barber.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of assumpsit, originally brought in the Police Court, Honolulu, where judgment was rendered for the defendant.

An appeal was taken which was heard by Preston, J., who rendered judgment for plaintiff. From this judgment an appeal was taken to this Court.

By a stipulation signed by counsel for the parties and filed, the following question was submitted to the Court: "Whether or not the agreement between R. H. Graham (the defendant) and H. Barber, on file in said suit *in itself and considered alone*, operates to make Graham the owner of the business of the Saratoga House, so as to estop him from denying his liability to the plaintiff for goods supplied to the Saratoga House, at the request and direction of Barber."

After considering the arguments of counsel and the agreement mentioned, we are of opinion that the agreement itself does not have the effect contended for by the plaintiff and therefore answer the question in the negative.

The case will therefore go to trial upon the facts.

Jona. Austin, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, April 28, 1886.

J. R. SILVA *et al.* vs. A. J. LOPEZ *et al.*

APPEAL FROM DECREE OF PRESTON, J.

APRIL TERM, 1886.

JUDD, C. J; McCULLY and PRESTON, JJ.

In a bill to set aside a sale made under a power in a mortgage, plaintiffs offered to pay the mortgagee any sum found due on the mortgage, upon an accounting.

Held that this gave a Court of Equity power to decree that plaintiffs pay said mortgagee the deficiency following a subsequent sale on foreclosure by order of the Court.

Appeal dismissed.

OPINION OF THE COURT, BY JUDD, C. J.

It appears that at the close of this case, which has been before the Court in various stages since August, 1884, at a hearing had before Mr. Justice Preston, on January 19, 1886, decree was made ordering judgment in favor of A. J. Lopez against John R. Silva for \$1,063 26, being the amount due and unpaid and owing by John R. Silva to said Antonio J. Lopez, after deducting the amount realized from the sale of the mortgaged property, which amount, so realized, has been deducted and paid to said Lopez on account of the finding of the amount due him by the Master's Report, of \$7,201 10, said sum so paid on account of said sale being \$6,137 84. And it is further ordered that the Clerk pay the balance of money in his hands on account of said mortgage sale to the said A. J. Lopez.

From this decree Messrs. Ashford & Ashford, attorneys for J. R. Silva, appeal and say that the Court has no jurisdiction to render judgment against complainant; that the respondent, Lopez, should have filed a cross-bill to entitle him to judgment.

The bill in this case was to set aside a sale made by defendant under a power of sale in a mortgage by the plaintiffs, and the allegations therein make it substantially a bill for an account and for redemption of the mortgage.

It contains the tender to do equity, as follows: "Your orators and oratrices hereby offering to pay said mortgagee or other parties in interest whatever sum or sums may, upon such account as above prayed for, be found due and owing upon said mortgage."

We think this was sufficient upon which to decree judgment against the complainant for the amount found due by him on the reference.

The decree of Mr. Justice Preston, of 19th January, 1886, was in conformity to the decree of the full Court of date the 14th October, 1885. The part in question is as follows:

"And this Court doth further order and decree that the property comprised in the said deed of mortgage be sold by public auction under the order, direction and control of one of the Judges of this Honorable Court, at the expiration of one month from the date of the ascertaining the amount due in respect thereof, unless previous to such sale the complainants pay to the defendant Lopez the amount ascertained to be due as aforesaid; and that the money arising from such sale be paid into Court, and after payment thereof of the amount due to the defendant Lopez, the residue be divided among the parties complainant according to their respective interests."

It is clear that as the complainant did not pay the amount found due on his mortgage, the sale of the mortgaged property was justified, and was necessary to foreclose the mortgage and end the litigation. The proceeds of the sale were insufficient to pay the amount found due, and a judgment over for the deficiency followed, according to the practice of this Court in foreclosures of mortgages.

We are referred by counsel for plaintiff to 2 Jones on Mortgages, Sec. 1711, as follows: "A Court of equity cannot, independent of any provision of statute giving the authority, decree the payment of the balance that may remain of the mortgage debt after applying the proceeds of the property mortgaged, unless the debt, without the mortgage, was such that a Court of Chancery would have jurisdiction of it and could enforce it." * * *

"Without the aid of a statute or of circumstances giving

equitable jurisdiction over the demand, the only proper remedy for the deficiency is by action at law upon the bond or note."

Citing *Dunkley vs. Van Buren*, 3 Johns., Ch. 331.

We also refer to 2 Jones' Mortgages, Sec. 1095. "The bill to redeem must make a tender of the amount the plaintiff concedes to be due on the mortgage debt, or must offer to pay whatever may be found to be due."

It seems to us that the admission in the bill of the execution of the note and the mortgage securing it, and the offer to pay whatever sum or sums may, upon account, be found due, gives this Court in equity jurisdiction over the debt and the means of enforcing it.

The appeal is dismissed.

Ashford & Ashford, for plaintiff.

C. Brown, for defendant.

Honolulu, April 28, 1886.

THE KING vs. TAI WA.

APPEAL FROM POLICE JUSTICE OF HONOLULU.

APRIL TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Defendant plead guilty of cruelty to ten mules, and was sentenced: the next day he was convicted of cruelty to two horses that he used while driving the mules:

Held, that the former conviction was no bar to the latter.

Judgment of Police Court affirmed.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an appeal from the Police Court of Honolulu to the Court in Banco on the point of law taken, that the charge should have been dismissed as the defendant had been previously convicted of the same offense.

It appears that he was charged with cruelty to animals, to wit, ten mules, in Honolulu, on the 11th of March last. He plead guilty and was sentenced. The next day he was arrested on a warrant and charged with cruelty to animals on the 10th of March, to wit, on two horses. It appears by the evidence sent up that the mules were a pack train; and of the horses, one defendant rode and the other he led. The horses were badly galled on their backs and sides, and were much exhausted.

The Act, Sec. 1, Chap. 81, Laws of 1884, prescribes: "If any person shall over-drive, over-load, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate or kill, or cause or procure to be over-driven, over-loaded, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, or needlessly mutilated or killed as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor."

Single living creatures may be the subject of cruelty. The cruelty charged in this case was the torturing and tormenting a horse by riding him while his back and sides were sore, and by leading another horse while in a similar condition. These were distinct acts of cruelty from those inflicted upon the mules. The defendant, had the prosecutor so chosen, might have been charged with the offense of cruelty to each of the ten mules, for the fact that they were fastened together by a leading line so as to make one train did not destroy the individuality of each mule, and make each one incapable of being the subject of cruel treatment. The horses were clearly distinct from the mule train, and acts of cruelty to the mules were not acts of cruelty to the horses.

We think the conviction was right, and the former conviction no bar to the second charge.

Appeal dismissed.

Honolulu, May 31, 1886.

THE KING *vs.* TAI WA.

APPEAL FROM POLICE JUSTICE OF HONOLULU.

APRIL TERM, 1886.

JUDD, C. J. ; MCCULLY AND PRESTON, JJ.

Sec. 12, Chap. 51, Laws of 1884, provides "that any person convicted under the provisions of this Act shall forfeit and pay any sum not exceeding twenty dollars, with or without hard labor not exceeding one month:" Held that the statute does not authorize imprisonment, and a sentence of imprisonment under it is illegal.

There being no error, except in the judgment of the lower Court, and the appeal being on points of law, the case cannot be remitted to the Police Court for a legal sentence: but the defendant must be discharged.

OPINION OF THE COURT, BY JUDD, C. J.

ON appeal from the Police Court on point of law.

The defendant plead guilty to cruelty to animals, to wit, ten mules, and was fined \$20 and sentenced to imprisonment at hard labor for ten days.

The defendant appeals on the ground that the sentence was erroneous, it being a fine and imprisonment, whereas the law does not authorize a sentence of imprisonment.

The statute, Sec. 12 of Chap. 51 of Laws of 1884, reads: "Any person convicted under the provisions of this Act shall forfeit and pay any sum not exceeding twenty dollars, with or without hard labor not exceeding one month, in the discretion of the Court."

We notice that the statute does not authorize imprisonment, there being an evident omission of necessary words. The sentence, therefore, imposed by the Police Justice is illegal.

The counsel for defendant contends that he is now entitled to be discharged.

The Attorney-General contends that the case should be remitted to the Police Court for legal sentence.

On *habeas corpus*, the illegal sentence being shown to the Court by the mittimus, the defendant would undoubtedly be en-

titled to a discharge. The statutory proceedings by writ of error authorize the Court to modify the judgment, or remand the case for a new trial; but error does not lie in a criminal case. It is urged with some force that an appeal brings the case before the Court *de novo*. But while a general appeal may have that effect, an appeal on points of law is substantially an exception to the ruling of the Court below, and raises an issue of law. The only error here is in the sentence.

In *Elliott vs. The People*, 13 Mich., 365, the Court held when the sentence imposed by the Court upon the prisoner is in excess of authority, and therefore unlawful, the Court cannot substitute for such sentence a lawful one; and, if there is no error except in the judgment, there can be no new trial, nor can the Court below give a second judgment, hence the prisoner must be discharged.

In the *King vs. Bourne et al.*, 7 Adolphus and Ellis, 58, it was held that "where an erroneous judgment is given by an inferior Court on a valid indictment (as by passing a sentence of transportation in a case punishable only with death), and the defendants bring error, this Court can neither pass the proper sentence, nor send the record back to the Court below in order that they may do so, but the judgment must be reversed, and the defendants discharged."

We think the defendant is entitled to his discharge, and so order.

Attorney-General, for the Crown.

Ashford & Ashford, for defendant.

Honolulu, May 31, 1886.

H. S. TREGLOAN vs. H. F. BERTELMAN.**APPEAL FROM FINDINGS OF PRESTON, J.****APRIL TERM, 1886.****JUDD, C. J. ; McCULLY AND PRESTON, JJ.**

A lease was dated and acknowledged on 26th August, and expressed no other time for beginning of rent; lessees and their assigns paid the rent at various times from the 1st to the 10th of each month, and the testimony was that this was done for convenience; held there was not evidence sufficient to support a waiver by the lessor of his right to collect rent on the 26th day of the month.

The evidence fails to show that plaintiff distrained the goods of a sub-tenant, thus releasing defendant from his covenant to pay rent: or that by any acts of defendant or his assigns the term was surrendered.

Judgment affirmed.

OPINION OF THE COURT, BY McCULLY, J.

IN appealing this cause, the parties, by their counsel, make the following stipulation:

“The points of law involved herein and which are hereby submitted to the Court in banco, are

(a) Does the record show that said plaintiff, subsequent to the execution of the lease on which this action is based, and prior to December 1, 1885, by valid contract with defendant or his privies, waived his right to collect rent under said lease upon the 26th day of the month? and if so, what day of the month was substituted therefor?

(b) Does the record show that any distress was levied by plaintiff on the premises, sufficient in law to release the defendant from his covenants in said lease contained?

(c) Does the record herein show that Mr. Justice Preston, in giving said judgment, erred, in that he found that there had been no surrender of said lease by defendant's privies, to plaintiff, prior to the institution of this action? or that said Justice erred

in rendering judgment for the plaintiff herein? or that the amount for which such judgment was rendered should have been different? and if so, for what amount should it have been and for what amount shall final judgment stand?

It is further agreed that for the purpose of this appeal, the record herein shall be considered to consist of the several exhibits, the minutes of evidence taken by said Justice and the clerk respectively, at the trial before said Justice, and the written opinion or decision of said Justice on file therein."

As the decision of Mr. Justice Preston, sitting as Intermediary Judge, is to be considered and as it states the case, we quote it:

OPINION OF PRESTON, J., BELOW.

Action of covenant for \$200, being two months' rent reserved by lease of Saratoga House from the plaintiff to the defendant.

The lease was assigned by defendant to Steiner, by Steiner to Graham, and by Graham to Krouse, who became bankrupt, T. R. Lucas being appointed assignee.

The defendant insisted that the term had been surrendered by Lucas to the plaintiff by operation of law, and that the plaintiff had discharged him by accepting Krouse as his tenant, and cited *Dodd vs. Acklorn*, 6 M & G., 672; *Thomas vs. Cook*, 2 B. & Ald., 119; *Amory vs. Kannaffski*, 19 Am. Reps., 419.

He also contended that, although by the lease the rent would commence from 26th of the month, yet the plaintiff had waived five days' rent and had agreed to take rent from the first of the following month.

In considering the testimony, I am of opinion that such agreement or waiver is not proven. And I also find that the plaintiff did not release the defendant from his covenant by collecting his rent from Krouse or the other tenants or otherwise.

The other question as to whether the lease was surrendered by operation of law is more important. The phrase "by operation of law" is not, as I conceive, appropriate; it is mentioned in the English Statute of Frauds as one way in which a lease may be surrendered, but this Section is not adopted by our statute; I think the more correct expression would be, surrendered in fact.

The cases cited on behalf of the defendant, do not, in my opinion, sustain the defendant's contention, but on the contrary, if properly considered, tend to negative it.

From the whole testimony, I am of opinion, and so find, that although the plaintiff might have agreed to take the lease and premises back from the assignee, yet that he altered his mind before the agreement was perfected by a legal surrender by deed as promised, and as he never took possession of the property, but returned the key to Lucas, the term was not surrendered, and the defendant is liable.

He will have his remedy against his assignee, Steiner, on his express covenant.

Judgment for plaintiff for \$200 and costs. The action being covenant, there will be no attorney's fee.

BY THE FULL COURT.

Regarding the point of waiver of right to collect rent on the 26th day of the month and the substitution of another day therefor, the testimony is:

Of Mr. Tregloan: "I was paid between the 1st and 10th of the month as a convenience; I was not paid on the 26th day of the month after the first instalment. Rent was due on the 26th of every month, but parties having lease asked to pay from the 1st to the 10th as a convenience."

The Police Court record shows that suit was commenced on the 27th of February, one day after the second month's rent was due.

Jacob Steiner testifies that he had a lease of the premises for some time. Paid rent to Tregloan, always from the 1st of the month in advance, not always paying on the first day, sometimes a few days later.

Bertelman, defendant, testifies: The first rent I paid was on the 1st or 2nd of September, for the month of September, in advance. (His receipt was burnt with his shop.) The lease was made on the 26th, Tregloan wanted a few days to move out, and my rent was to commence from the 1st. This was an arrangement.

Regarding the receipt, Mr. Bertelman testifies: I cannot tell the exact words of the receipt. It meant to convey impression that it was for one month's rent from 1st September. I think the re-

ceipt read one month's rent from date, and my agreement, previous to signing lease, was to take possession of the place from the 1st.

The lease in question is dated on the 26th of August, executed and acknowledged on that day, and expresses no other time for beginning to rent. It must, therefore, be held to be a lease from the 26th. The testimony above cited does not support a waiver of the written term. Tregloan contradicts Bertelman, whose evidence of the tenor of the first receipt must be considered vague. The rent may have been paid for convenience on the 1st, but it is also in testimony that it was paid for convenience from the 1st to the 10th.

As to the second reserved point, whether the record of testimony shows the plaintiff had distrained the goods of a sub-tenant and thereby released defendant from his covenants in the lease. The testimony shows that Tregloan, just before an auction sale of effects of tenant, demanded payment of rent due him, and was paid by the auctioneer out of proceeds. The testimony further is that Bertelman had left Tregloan to get his rent out of a succession of sub-tenants, if he could. But the demand made as above cannot be considered a distraint. The Act of 1864, found at page 277 of Compiled Laws, provides for making a distraint—goods distrained must be removed from the premises, and after fifteen days public advertisement may be sold—no such steps were taken by the plaintiff. He must be considered as merely having made a demand, acting as the defendant's agent.

Respecting the third point of the surrender of the lease and the acceptance thereof, Mr. Justice Preston's recital of the facts is sufficient and supports his conclusion.

The remaining agreed points seem to be determined by our finding on the first point submitted. The judgment must be for \$200.

Ashford & Ashford, for plaintiff.

S. B. Dole, for defendant.

Honolulu, May 31, 1886.

ONOMEA SUGAR COMPANY *vs.* H. C. AND F. H. AUSTIN.

APPEAL FROM DECISION OF PRESTON, J., ADJUDGING DEFENDANTS IN CONTEMPT.

APRIL TERM, 1886.

JUDD, C. J. ; McCULLY AND PRESTON, JJ.

Section 839, Civil Code, in regard to appeals to the full Court, held not to permit an appeal from the order of a Justice of the Supreme Court adjudging defendants in contempt.

Campbell's Case, 2 Haw. 27, approved.

The Court declines to hear such an appeal.

OPINION OF THE COURT, BY McCULLY, J.

A BILL of complaint was brought before Mr. Justice Preston asking for an injunction against the defendants to restrain them from interfering with the Onomea Plantation till the further order of the Court, and to command them to at once deliver up to the plaintiffs all the books of account, contracts and other property of the plaintiffs. An injunction to that effect was issued October 20th, and served on the defendants at Hilo October 22nd. It was afterwards made to appear to the said Justice that the defendants had refused to obey the injunction entirely until the fifth day of November, and upon surrendering the premises and books, etc., of the office, they had appropriated to their own use the sum of \$1,800 in the form of cash and notes, the proceeds of sugar of the plantation irregularly sold by them in Hilo, charging it in the plantation books as

Damages account H. C. Austin	\$1,000
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“ “ F. H. Austin	600
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Expenses “ Legal expense	200
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being “damages for summary and unwarranted and unauthorized dismissal and for legal expenses” for resisting the plaintiffs.

Upon citation to show cause why they should not be held in contempt, and hearing thereupon, the said Justice, on the 8th of December, adjudged them each guilty of contempt of Court, and

ordered them to severally stand committed to custody until they should pay into Court the sum of \$1,800.

The defendants forthwith paying this amount were held to have purged themselves.

The defendants' counsel have claimed an appeal and have been heard, the Court however reserving the question of jurisdiction to be considered *in limine*.

The case of *Alex. Campbell*, 2 Hawn. 27, was one of contempt. He was adjudged by the full Court to be in contempt by reason of a letter addressed to one of the Justices. The Court heard a motion to vacate its order, considering it within its discretion to do so under the facts of that case, of its being a matter between the Court and one of its own officers, holding that if it were otherwise it would have no power to review or set aside the order, and could only rectify or amend what appeared clearly a mistake or clerical error, and saying, "If the right was asserted to control the proceedings of any other court of record it could not be entertained, for when a court commits a party for contempt their adjudication is a conviction, and the commitment in consequence is execution; and so the law has been settled."

It must be considered here that the court of a justice sitting in equity is "another court" than the Supreme Court in Banco, as much so as if the justice appealed from did not also belong to the court of appeal, and this case might rest upon the authority of the above decision. But counsel cite Section 839 of the Code, which was not in existence at the date of Campbell's case, as allowing an appeal from orders of commitment for contempt. The section provides that "An appeal may be taken to the full court in banco from any decision, order or decree made by any Justice of the Supreme Court at chambers. * * * Nothing in this section contained shall be construed to permit an appeal to be taken from any order by any justice allowing any warrant, attachment, writ or other process, or for the taxation of costs or any other order of a like nature."

We have to consider whether an order for commitment for contempt comes within the appealable cases, or is excepted specially or generally.

The statute provides for the punishment of contempt, as an ob-

struction to justice, by trial by jury and a penalty by imprisonment or by fine, with a provision that the several courts from the highest to the lowest may summarily punish contempts according to a graduated scale of penalties. Penal Code, Chapter XXIX, and Compiled Laws, page 818. Among the particulars of what may be contempt enumerated in Section 8 of the above Chapter XXIX is "willful disobedience or neglect of any lawful process or order." Section 20, which corresponds with Section 1098 of the Civil Code, provides that when the contempt consists in the omission or refusal to perform an act which is yet in the power of the party to perform, he may be imprisoned until he have performed it.

If Section 859 gives an appeal against orders adjudging contempt, it applies to all descriptions of the offense. Appeal would lie from the summary punishment of contemptuous, contumelious, disrespectful or disorderly language, behavior, etc., *in facie curiae*. This would be contrary to common-law doctrine, as it is stated in the first Section of Rapalje on Contempts: "It is conclusively settled by a long line of decisions that at common-law all courts of record have an inherent power to punish contempts committed *in facie curiae*, such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court;" and in Section 141 *ibid.*: "Every superior court of record being at common law the sole judge of contempts against its authority and dignity, it naturally results that the judgment of every such court is, at common law, final and conclusive, and not reviewable by any other tribunal, which in other cases would lawfully exercise appellate jurisdiction either on writ of error or appeal, unless especially authorized by statute."

It is too plain for controversy that if an appeal were to be allowed by the force of Section 859 in such cases of contempt, courts would be deprived of a power essential to the preservation of their authority and dignity. But it must be held that if the statute gives an appeal in such a case as that at bar, it equally applies to the other instances of contempt. We ought then to consider whether a construction so adverse to the common law, and which renders nugatory an "essential" power of courts, is required to be given to Section 859.

The order finding a party in contempt is of a discretionary character. The exercise of this great authority must lie in the prudence and good judgment of a court. The cases expressly excepted, of allowance of warrants, writs, attachments and other processes, and measurably too of costs, are entrusted to the discretion of the justice, and are therefore not appealable. There are other orders of a like nature not specified, which the statute leaves to the judge without appeal. Among these we place the power of a court to maintain its dignity by summary punishment for contempts, and the authority of its processes as prescribed by Section XXIX of the Penal Code, and Section 1098 of the Civil Code.

The Court *in re* Campbell say, "contempts may not only occur in the face of the court, but they may be committed out of court, and without this power it might be impossible to proceed in the discharge of their duties."

We decline on appeal to hear the case.

W. A. Whiting, for plaintiffs.

Ashford & Ashford, for defendants.

Honolulu, May 31, 1886.

A. J. LOPEZ *vs.* ACHEU.

APPEAL FROM DECISION OF McCULLY, J., ON DEMURRER.

APRIL TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Plaintiff filed a bill in equity to restrain defendant from opening a water-way whereby water was discharged on plaintiff's land; but averred in the bill that plaintiff's lessees had obstructed the water-way and prevented the discharge of the water.

Held, on demurrer, that the injury to plaintiff's land having thus ceased, and there being no allegation that defendant threatens to re-open the water-way, the bill is demurrable on this ground.

Demurrer sustained.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an appeal by plaintiff from a decision of Mr. Justice McCully, sustaining a demurrer to the bill filed, which was for an injunction to restrain defendant from opening a water-way through a bank, whereby the water from defendant's land was discharged on plaintiff's land. The plaintiff is the reversioner.

The bill, after reciting the situation of the lands of the respective parties, shows, among other things, that there was a bank which separated plaintiff's and defendant's lands, and protected plaintiff's land from the influx of water from defendant's land, but that defendants have opened a water-way through the bank, so that the ditch, which was formerly used to supply water to plaintiff's land, became a drain and conveyed and discharged the waste water from defendant's land upon plaintiff's land, "whereby it was flooded and was liable to become unfit for use, which complainant alleges was a new and unheard of use thereof, and one to which it had never before been put, and for which use no right existed; *complainant's lessees, therefore, obstructed said water-way through said bank and prevented the draining of defendant's lands upon the land of complainant.*"

It thus appears by the italicised portion of the bill above quoted that the water-way complained of was obstructed by complainant's lessee. The injury to plaintiff's lands has thus ceased. There is no allegation that it has been re-opened by defendant, or that he has threatened to re-open it. We think the bill is demurrable on this ground. No continuing injury is alleged, and none is threatened. The prayer for injunction says that "by reason of the premises, irreparable injury will be done to the reversion, etc." The "premises" are the stating part of the bill, in which it is alleged that the acts complained of are at an end.

Whether the injury by flooding plaintiff's land is likely to produce permanent injury to the reversion, it seems to us would be a matter of fact which the Court could not decide without evidence.

The ground upon which the demurrer was sustained by the Court below, is not so clear. An action was brought in 1884, by defendant against plaintiff's lessees, for stopping the water-way

through the bank above referred to, and damages recovered. This is alleged in the bill, and it is urged by defendant's counsel that it shows that there is a doubt as to the legal right of plaintiff to maintain this protecting bank unopened. Counsel say the Court should not grant an injunction in aid of a legal right, unless that right is clear.

An examination of the case will show that the question of the right of the defendant to maintain an opening through the bank was not gone into. The question cannot then be considered as *res adjudicata*. When a permanent injury to real estate is threatened and equity is appealed to for an injunction, the Court must necessarily investigate the rights of the parties to the easements which it is contended exist. On this ground we do not think the bill was demurrable.

The demurrer is sustained without prejudice to the right of the plaintiff to amend or file a new bill in twenty days.

W. R. Castle, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, June 8, 1886.

J. PHILLIP vs. G. J. WALLER.

EXCEPTIONS TO RULINGS OF PRESTON, J.

APRIL TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

In a suit for damages for malicious prosecution, defendant offered evidence as to certain keys found on plaintiff; held, this evidence was admissible, as part of the *res gestæ*, and as tending to mitigate damages, but not as affording proof of plaintiff's guilt.

Facts sufficient to induce belief in the guilt of the plaintiff must have been known to defendant before he commenced the prosecution, in order to ground upon them probable cause.

Evidence of conversations of defendant with police officers, while he was making charges against plaintiff at the station, held admissible as part of the *res gestae*.

Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person who is arrested is guilty. It does not depend upon the actual state of the case in point of fact, but upon the reasonable belief of the party prosecuting.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is a suit to recover damages for a malicious prosecution, the plaintiff claiming that he was maliciously, falsely and without probable cause, accused of the crime of burglary, and was arrested and imprisoned therefor at the instance of defendant. The jury found a special verdict, that the defendant was justified in believing that he had probable and reasonable cause to arrest the plaintiff, and therefore a verdict was rendered for defendant. The case comes to us on plaintiff's exceptions to rulings of the Court in the progress of the trial, and to various portions of the charge to the jury. The exceptions do not appear to be set forth in the bill in the order they were taken at the trial, and they are therefore confusing. Some fifteen requests for instructions were asked for.

The first exception is the admission of the testimony referring to keys found on plaintiff after arrest. The discussion arose, as appears by notes of the presiding Justice, as to the admissibility of the testimony by the defendant Waller, as to the statements made to him by police officer Marcos. The defendant's counsel offered to prove that two keys were found on plaintiff, on his arrest—that officer Marcos took the keys to the house of the defendant on the same day; that the keys were tried on the locks; one was found to open the outer door and one the inner door; that the locks were peculiar ones and needed peculiar keys to open them; also that a great many keys had been tried by Waller and his wife without succeeding in opening the doors; (witness produced the keys to show that they were filed to make skeleton keys;) that Marcos had tried the keys in the house and

that this was communicated to defendant after the arrest. This evidence was offered in mitigation of damages as to continuing imprisonment of plaintiff and as part of the *res gestae*. The Court said that it would admit the testimony. The jury had retired while this discussion took place and the Court adjourned for the day, without the offered testimony being introduced. The next morning the witness, Waller, was asked, "When did you first hear of these keys?" He answered, "On the Saturday afternoon of the arrest, from my wife." This is all Waller said on the subject. Mrs. Waller testified that the first time Marcos came, after the arrest, he brought the keys.

Marcos testified: "Found these keys on plaintiff; went to Waller's house and tried doors. One opens front door, and one back door. I call the front door the one on the Waikiki side. One opens inner door. I asked defendant as to keys. He said one belonged to room upstairs, and one to his own room in Fowler's yard. I went upstairs; the key would not fit."

The plaintiff was recalled to account for the keys. He said: "This is the key of the room in which my clothes are kept in Waller's shop. This belongs to Fowler. I occupied room No. 8. The one at Waller's was not tried because there was a new lock; the other (key) opens my room at Fowler's. I did not file the keys."

We think the testimony was admissible as part of the *res gestae*, and as tending to mitigate damages, as this knowledge was acquired by the defendant on the afternoon of the arrest and while plaintiff was still in prison. So far as it afforded proof of the guilt of the plaintiff, it was probably not admissible, and the jury was charged that it must appear that the facts, or so much of them as was sufficient to induce the belief in the guilt of the plaintiff, were communicated to defendant before he commenced the prosecution.

In *Bacon vs. Towne*, 4 Cush., the Court say that the defendant in an action for malicious prosecution may give evidence of facts tending to prove the plaintiff guilty of the criminal charge imputed to him, both in proof of probable cause and mitigation of damages; although he is not prepared with evidence to show

that these facts were known to him at the time of the complaint against him.

This instruction, we may here remark, covers instruction No. XIV, asked for by plaintiff, as follows: "Only those facts and circumstances, which were within the knowledge of defendant, prior to or at the time of preferring the charge, can tend to exonerate him from malice and permit him to ground upon them the belief that reasonable and probable cause existed for his actions."

The second exception is to the admission of evidence of defendant, of a conversation with officer Marcos, and the objection was made that, as Marcos was not an attorney or counsellor at law, he was not competent to give advice.

The defendant was asked what he did after the information was given him. He said: "Police officer Fehlbler said I had better see Deputy Marshal, Mr. Dayton. I followed Fehlbler to the station house and asked to see Dayton. Was told by Marcos that Dayton was busy. Marcos was then engaged in writing out the warrant for the arrest of men. I gave no instructions. I found he expected me to swear out warrant. I objected; asked consequence if not guilty. He said: 'They can't touch you.' I still objected. He said: 'We always protect honest men.' I then swore out warrant on assurance given by Marcos." The counsel for plaintiff excepted to this evidence as irrelevant and incompetent because the police officer was not known to be an attorney or counsellor at law, competent to give advice, and the evidence should be stricken out.

The Court declined to order the testimony stricken out. It was not offered by defendant's counsel as a justification of the defendant; as having acted upon responsible advice; but it was given by defendant as a narrative of events. It was the account of his proceedings in swearing out the warrant in question and could not have been excluded.

We pass now to the instructions prayed for:

1. An abandonment of a prosecution is sufficient to entitle the plaintiff to maintain this action; it is not necessary that he should have been tried and acquitted. The Court charged: "The

plaintiff must prove that he has been prosecuted by defendant, and that the prosecution terminated. This has been proved."

We think this was all that was necessary.

The second, third, fourth and fifth instructions requested are as follows:

II. It does not depend upon the guilt of the accused, nor whether the prosecutor believed him guilty, to show probable cause, but whether or not the facts and circumstances within the defendant's knowledge, and upon which he acted, were sufficient to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man, and did upon such ground defendant believe plaintiff guilty.

III. If defendant did not know any facts constituting probable cause, the existence of probable cause is no defence.

IV. The plaintiff must show knowledge or information entitled to credit which led him to prosecute, to establish the existence of probable cause.

V. If the jury find from the evidence that the facts and circumstances within the defendant's knowledge were not sufficient to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man of the guilt of plaintiff, they cannot find that probable cause existed.

In place of them the Court charged: "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person who is arrested is guilty. It does not depend upon the actual state of the case in point of fact, but upon the reasonable belief of the party prosecuting."

Instruction VI is: "The want of probable cause cannot be implied. It must appear by proof, but malice may be implied from a want of probable cause when the latter is proven."

The Court charged: "Want of probable cause must be proven by plaintiff. It cannot be inferred. Proof of malice need not be direct. It may be inferred from circumstances. If there were no probable cause, malice may be presumed." We think the charge covered the ground exactly.

Instruction VII is: "The defendant must believe in good faith in the truth of the charge preferred by him against the plaintiff,

and in the plaintiff's guilt; this is essential to establish reasonable and probable cause for the criminal prosecution, and it is for the jury to determine what the defendant's belief was, if such belief existed in good faith, and whether he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on his belief." The jury were asked specially to say whether from the facts they found that defendant was justified in believing that he had probable and reasonable cause to arrest the plaintiff, and they found that he was justified.

As to instruction VIII, which reads: "Defendant cannot show that he acted under the advice of a magistrate or other person not learned in the law."

As we have seen above, in considering the second exception, the defendant did not attempt to show that he was justified by acting upon the advice of counsel, and it was not claimed that officer Marcos' advice justified him.

Instruction IX: "If the jury find from the evidence that the defendant did not believe in the truth of the charge which he was induced to make against the plaintiff, malice may be inferred." This is instruction VII, put conversely, and the jury under the instruction given by the Court found that the defendant was justified in believing that probable cause existed, etc.

Instruction X: "Proof of want of probable cause will warrant a presumption of malice." This is a repetition of Instruction VI, and our observations thereon will apply to it.

Instruction XI: "The charge, which is founded on the accuser's own knowledge, will require proof to that extent to warrant such a charge, but where it rests on suspicion only, such suspicion must be created by circumstances which satisfy a cautious person." This is, as we think, covered, so far as is necessary, by the charge of the Court above given in place of Instructions II, III, IV and V, asked for.

Instruction XII: "If circumstances of suspicion existed which might have been removed by proper inquiry, and no inquiry at all was made, it is evidence of a want of reasonable and probable cause." To this the answer is plain. It is not shown that any

inquiry, under the circumstances, would have removed the suspicion entertained by defendant.

A disposition not to investigate further, if investigation would have removed the suspicion, might be malice, but it would not show a want of probable cause, for that is founded upon the suspicion.

Instruction XIII: "If the charge preferred by the defendant against the plaintiff was of such a nature, and made under such circumstances, that no well-intentioned person would find a criminal charge upon them without ascertaining their truth or falsity, and the means of inquiry and ascertaining the truth being within his reach, had he thought fit to avail himself of such means, and the defendant failed to ascertain such truth or falsity, then it will show that he was influenced by malice." This is objectionable in its form as being argumentative.

Instruction XIV: "It is competent for the jury to consider any doubt which defendant expressed about plaintiff's guilt at the time the charge was preferred by defendant, in deciding whether he believed in good faith that the plaintiff was guilty of the criminal charge."

This must refer to the conversation held between defendant and Marcos, and to which the attention of the jury was called by the Court. It was left to them whether he expressed doubts as to plaintiff's guilt, and whether the effect of the whole conversation was such as to prove or disprove the good faith of the defendant in preferring the charge.

Instruction XV is already disposed of *supra*.

The instructions asked for by Mr. Hatch for defendant, and which were given by the Court, are as follows:

First: "Anything which will create in the mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause."

Secondly: "Plaintiff must show malice on part of defendant, or that he acted from improper motives."

Thirdly: "If Waller had any reason, however slight, to believe plaintiff guilty of robbery, plaintiff must then prove actual malice."

These are in consonance with the well settled principles con-

trolling such cases, defining probable cause, and that if it exists, malice must be shown, and coupled with the other instructions of the Court were correct.

The Court has charged that "if no probable cause is shown, malice might be presumed." It is claimed in addition that certain expressions used by the Court in its charge were improper comments on the testimony, and tended to prejudice the jury against plaintiff, as follows :

"The plaintiff has not accounted for where he was on the night of the theft." We are referred to the testimony where plaintiff says he was at the telephone to receive orders for the morning delivery of meat till about half-past 8 o'clock in the evening ; locked up shop at 9 o'clock and went home. As the robbery may have been committed at a later hour of the night, the remark of the Court was justified. As to the other expression objected to, that "the plaintiff had not testified that he did not steal the money," we understand that it arose in this way : The Court said that if the jury found for the plaintiff, and believed that he had made the charge maliciously, he would be entitled to substantial damages ; but if they thought the plaintiff was guilty of the burglary, they could not give damages to the extent they otherwise would. It was for the plaintiff to show that the charge was false ; and though he had been called as a witness he had not denied his guilt, or accounted for himself on the night of the robbery. The plaintiff was not asked if he had stolen the money, and the record therefore shows no specific denial of the charge. We wish to say further, that counsel should call the Court's attention to specific portions of the charge objected to at the conclusion, and thus afford the Court an opportunity of reviewing the language used ; and it is not fair to the Court to except generally to the charge, and thereafter in the exceptions to single out special portions as objectionable.

It is finally objected by plaintiff's counsel "that it was improper for the Court to say to the jury that they might take into consideration the effect which actions of this nature may have upon prosecution of crime."

The comment was made in this connection : The Court said that "*bona fide* prosecutors were entitled to protection, and that

in considering the question of damages they ought to take into consideration the effect which actions of this nature may have on prosecution for crime."

The Attorney-General was counsel for the plaintiff. He is by law the public prosecutor; and if he should appear as counsel to sue for damages in behalf of parties for matters arising out of the criminal prosecutions, it would tend to discourage, if not to prevent, prosecutions for offences. Both counsel mentioned to the jury this circumstance of the Attorney-General's appearing, and it was not improper for the Court to express its disapprobation of this course, and its effect upon the prosecutions for crime.

The direction of the Court to the jury "to find a verdict for defendant on their finding that the plaintiff had probable cause to commence the prosecution", is excepted to. We think that this was right. The gist of the action was whether there was probable cause shown, and this being found by the jury, the verdict for defendant would follow as a matter of course. The matter of evidence specially raised in the motion for a new trial, on the ground that the verdict of the jury was not supported by the evidence, is covered by the ruling of the Court on the second exception, so far as the conversation with Marcos is concerned.

As to the statement in the bill that Waller said "he believed Campbelman's statement to be entirely untrustworthy," it is not supported by the Judge's notes. We find it to be as follows: Waller testifies: "Officer Fehlber came to my store and said: 'The man Campbelman knows who stole your money.' I answered Fehlber: 'This man has been to me before, and I hardly thought his evidence was worth much,' and later on I told Fehlber I did think Campbelman's evidence was worth anything." This was the opinion of Waller on the importance of Campbelman's testimony, and not as to its credibility.

We think the exceptions should be over-ruled, and so order.

Paul Neumann, for plaintiff.

W. A. Whiting and *F. M. Hatch*, for defendant.

Honolulu, June 21, 1886.

M. P. ROBINSON vs. L. G. SRESOVICH et al.**EXCEPTIONS TO RULINGS OF PRESTON, J.****APRIL TERM, 1886.****JUDD, C. J.; McCULLY and PRESTON, JJ.**

It being left to the jury to say whether D. was defendant's agent, receipts given by D. as agent are admissible in evidence.

Defendant held liable, upon the evidence, to pay plaintiff, a consignor, the highest price received for any lot of similar fruit shipped by the same vessel, provided that plaintiff shipped good merchantable fruit, defendant having intermingled the consignment with his own fruit.

The Court may decline to give an instruction to the jury where the question on which the instruction is desired is not raised by the evidence.

Exceptions overruled.

OPINION OF THE COURT, BY JUDD, C. J.

THIS is an action of assumpsit to recover the sum of \$900, for price of certain bananas, sold and shipped by plaintiff to defendants in San Francisco.

The verdict of the jury was for plaintiff for amount claimed with interest. The case comes to us by exceptions of the defendants as follows:

I. "The defendants excepted to the admission in evidence of certain receipts for the bananas, shipped per steamer, to R. Levey, San Francisco, signed in Honolulu by one Henry Davis, on the ground that there was not sufficient evidence that Davis was defendants' agent." It was an important question of fact in the case, for the jury to pass upon, whether Davis was the agent of defendants; for if he, as their agent, accepted the bananas, they would be held liable.

Upon this there was much evidence adduced by plaintiff. But, as it was left to the jury to say whether they were satisfied from the evidence that Davis was defendants' agent, his receipts in

this capacity were admissible, otherwise the evidence of his agency would be without final effect.

II. The Court was requested, by defendants' counsel, to charge: "If the jury find that the plaintiff consigned to defendants the bananas, the price of which this action is brought to recover, and that there was no obligation under the contract for defendants to receive them, then those shipments were made at the exclusive risk of the plaintiff."

The Court could not, in view of the evidence adduced, justly charge in the terms as requested, for as above intimated, there was evidence tending to show that the bananas, for the price of which this action was brought, were accepted and received from plaintiff in Honolulu, by defendant's agent, and by him shipped to defendants in the same invoice with bananas procured from other sources, and both lots were intermingled and taken to defendants' store in San Francisco, and sold indiscriminately; so it was impossible to say what the bananas from plaintiff realized. The Court properly charged that, under the circumstances, if the jury found that the plaintiff's bananas were good marketable bananas, properly packed, the defendants were liable for the highest price obtained for any of the lot.

III. The Court was requested to charge: "If the jury find that defendants exercised reasonable care in the preservation and disposal of those (plaintiff's) bananas, and that no more was realized from the sale thereof than is stated in the accounts rendered by defendants to plaintiff, they must find for defendants." The Court charged that "if the jury found that defendants took the same care of plaintiff's bananas that they did of other bananas, and took the same care to obtain the best price, and that the price they obtained was the best that could be obtained, then they must find for defendants." We think the Court was right, especially in view of the charge already given above.

If defendants had mingled plaintiff's goods with their own, so that they could not be distinguished, they were bound to exercise the same care in their preservation and disposition as they exercised towards their own goods.

This would hold them to a greater degree of care than merely reasonable care.

The fourth request was as follows: "If the jury find from the evidence that deceit was practiced upon defendants in the shipments of bananas, they will find for the defendants."

This the Court declined, as no evidence had gone to the jury tending to show that any deceit had been practiced. This was right. "A Court may properly decline to give instructions to a jury, when the question upon which the instructions are desired is not raised by the evidence." *Wendell vs. Moulton*, 26 N. H., 41. It is not erroneous in a Judge to decline instructing the jury in the manner requested by either party, when the instructions prayed for are not found in the evidence, or not applicable to the case. *Drake vs. Curtis*, 1 Cush., 395. "A party has no occasion and no right to frame an hypothesis not founded in the evidence, and to ask for the instructions of the Court upon such a state of things." *Rice vs. Porter*, 17 N. H., 137.

The counsel for defendants also excepted to the charge of the Court, in saying in substance, "that there was no evidence on what date the different consignments were sold, nor the names of the persons to whom they were sold; and, as one of the witnesses testified that he saw the bananas in defendants' store, one week after their arrival, the jury might fairly draw the inference that the defendant may have sold them to himself." It is not indicated to us in what manner this observation of the Court was not a fair comment on the evidence. If it be true, as testified to by one of defendants' witnesses, that the bananas were seen by him in defendants' store one week after their arrival, and he sold them indiscriminately with his own bananas to purchasers in small lots, keeping no separate account of what the plaintiff's bananas brought, this transaction would amount to taking plaintiff's goods over to himself, and he would thus be accountable for the highest price he obtained for any. This is but a repetition of exception III, considered above.

Exceptions overruled.

F. M. Hatch, for plaintiff.

P. Neumann and *W. A. Whiting*, for defendants.

Honolulu, June 8, 1886.

Subsequently to the signing of the foregoing decision, counsel

for the defendants filed a brief, which they requested the Court to consider previous to filing its opinion.

We have carefully considered such brief and the arguments and authorities cited, but see no reason to alter the decision before arrived at.

Honolulu, September 16, 1886.

THE KING *vs.* J. W. KUMUHOA and E. KEKOA.

EXCEPTIONS FROM CIRCUIT COURT, THIRD JUDICIAL CIRCUIT.

JULY TERM, 1886.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

A motion to quash an indictment is not a proper subject of exceptions.

A motion to quash must be made before defendant has pleaded.

Inspectors of Election may appoint deputies to represent them on the Board of Inspectors, when the Inspectors themselves are actually absent from the place where the meetings of the Board are held : but not otherwise.

Inspectors of Election held guilty, under the Act of 1868, of malfeasance in the performance of their duties.

Exceptions overruled.

OPINION OF THE COURT, BY McCULLY, J.

EXCEPTIONS from the May Term, 1886, of the Third Judicial Circuit Court.

The defendants were charged in the Police Court of Hilo, from whence the case was appealed to the Circuit Court, with a violation of the laws relating to elections, in a neglect to perform certain official duties prescribed to a District Judge and a Tax Collector, which the defendants severally were, by Sections 6 and 7 of the Act of 1868, and were, on conviction, sentenced according to Section 812 of the Civil Code.

These laws are as follows :

“Section 6. The Inspectors of Elections, viz : The Police or

District Justice, the Tax Collector and the Tax Assessor, or, in their absence, agents appointed by them, shall, at least fifteen days before the day of holding any election for representatives, excepting such as may be ordered pursuant to the provisions of Section 797 of the Civil Code, make out and cause copies to be posted at the place where the election is to be held, and at least two other public places in the district, correct alphabetical lists of all the persons in the district who may be qualified to vote, and whose names may appear upon the list returned to the Inspectors of Elections by the Tax Collector of the district, as in the last preceding Section required.

"Section 7. The Inspectors of Elections aforesaid shall hold at least two sessions, of reasonable and sufficient length, at some convenient place in the district, not less than ten nor more than twenty days next preceding the day of holding an election for representatives, for the purpose of receiving evidence of the qualifications of persons who may not have been previously registered by the Assessor or Collector on the assessment register, as provided in Sections 3 and 4 of this Act, and who may claim a right to vote; and also for the purpose of correcting, when necessary, the alphabetical lists of voters provided for in Section 6 of this Act. Notice of the time and place of holding such sessions, respectively, shall be given by the Inspectors of Election upon the alphabetical lists posted, as provided in Section 6 of this Act: and at such sessions anyone offering testimony against the right of any person to vote whose name may appear in the aforesaid alphabetical lists, shall be reasonably heard; and if the Inspectors aforesaid shall be satisfied on such hearing that the name of such person should not have been placed on the register, they shall at once erase the same therefrom.

"Section 812. Any inspector of election who shall willfully neglect or refuse to perform any of the duties required of him respecting elections, shall be fined not exceeding one hundred dollars, and be disqualified from holding any office under the Government."

The first point made in the bill of exceptions is, that the Court erred in denying a motion, noted in the bill, as follows: "And upon said trial in said Circuit Court, after the jury had been

sworn in the cause, counsel for defendants moved the Court that said defendants be dismissed, and that the prosecution herein be quashed, for the reason that the Sections of the law pertaining to Elections, to wit: Sections 6 and 7 of the Act of 1868, on pages 223 and 224 of the Compiled Laws, under which the prosecution is brought, prescribe no penalty for the non-observance of the Acts therein and thereby enjoined upon the Board of Inspectors of election nor is any penalty prescribed for their non-observance."

A motion to quash, (Archbold Crim. Pr., Vol. 1, page 337,) is addressed to the sound discretion of the Court, and is not a proper subject of exception, citing *inter al.*, *Com. vs. Eastman*, 1 Cush. 189; *State vs. Putnam*, 38 Maine, 196; *U. S. vs. Stowell*, 2 Curtis, 153; *State vs. Stuart*, 23 Maine, 111. Says Appleton, J., in *State vs. Putnam*: "It is within the discretion of the Court in which an indictment is pending to quash it, or to leave the defendant to his motion in arrest of judgment. The refusal to quash an indictment is not a proper subject of exception. The party indicted has his remedy by motion in arrest of judgment, or by demurrer to the indictment."

We remark secondly that, as a motion to quash the charge, it was made too late.

At this stage of the proceedings the defendants must be considered to have pleaded. To appeal from the conviction of a lower Court and demand trial is equivalent to a plea of not guilty. It is a general rule of pleading that motions to quash must be made before plea, and the plea cures defects in the indictment for the purposes of the trial of the issue. Our Statute Act of 1876, Chap. XL, Section 33, found at page 347 of Compiled Laws, provides that "every objection to an indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment before the accused has pleaded, and not afterwards." The Court was therefore right in refusing, after the jury was sworn, to entertain the motion.

Exceptions are also taken to the refusal of the Court to give the following instructions, numbered 1, 2, and 4, requested by the defendant:

1. "It is the right of a District Judge, Tax Assessor or Collector, to appoint a deputy to represent him on the Board of Inspectors

of Election, in cases where the absence or other duties of the officer render it inconvenient or impracticable for him to discharge its duties." The Statute authority concerning the appointment of agents or deputies is contained in these words in Section 6 of the Act of 1868; "The inspectors of election, viz., the police or district justice, the tax collector and the tax assessor, or, in their absence, agents appointed by them, shall," etc.

The charge of the Court is incorporated with the bill of exceptions. Upon this point it is as follows: With regard to Kekoa's right to appoint a deputy to act for him in his absence, the "absence" meant by the statute is an actual absence from the place, where the meetings of the Board are held. We regard this as a sound interpretation of the statute. Its terms are vague in not expressing grounds of excusable absence justifying the appointment of a deputy or agent, but by the plainest rules of construction he must be absent; if he is present and in attendance at the meeting of the Board, it would be a violation of the term to say that he was absent; the words "in their absence" have a meaning, but it is frustrated by the construction claimed for it by the defendant's counsel; he asks that there be imported into the statute conditions not expressed therein, namely: "Where other duties of the officer render it inconvenient or impracticable for him to discharge his duties." It is enough to say that this is not the law nor to be implied from it, and the Court could not properly instruct the jury that it was, as requested.

2. The next instruction asked is, "It was the right of the defendant Kekoa in this case to appoint a deputy if his other duties interfered with his performing the duties of such inspector;" this is covered by the ruling on the first instruction. The remainder of the instruction, that the principal officer cannot be held to be criminally liable for the acts of his deputy, was not refused to be given, the Court instructing only that there could not be considered to be a deputy where the principal was not absent. The evidence in the case is that Kekoa sat with the Board at its meetings, and assisted to make three alphabetical lists of voters' names, two of which were correct and agreed with each other; but in the third list, the one upon which the polling of votes was had, thirty-five names were omitted by Kekoa,

although the numbers of the tax receipts were given. Kekoa testifies that he did this, "trying to see which would be the smartest, Kauwila, the Opposition candidate, or himself." He only appointed his deputy on the day of the session of the Board when the lists were revised, he being present in the room, and only one meeting for revision being held.

The charges relate to a prior malfeasance, namely: In failing to hold two meetings of the Board, and in failing to post three "correct" copies of the same list.

4. Exception four is, substantially: It is not the duty of such Board to post upon or with the lists a notice of *two* meetings of the Board before the first meeting takes place.

The evidence is that no notice was given of a second meeting at any time, and none was held; it was, therefore, irrelevant to the case to give the instruction; giving it would have implied a state of facts which did not exist.

The exceptions are overruled.

W. A. Kinney, for prosecution.

Ashford & Ashford, for defendant.

Honolulu, July 23, 1886.

EMMA BECKLEY vs. FRANK METCALF *et al.*

APPEAL FROM THE CHANCELLOR.

JULY TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

A testator devised the greater part of his real estate to his daughter, and charged it with payment of debts; it was sold to pay debts.

Held, that the devisee could not be reimbursed from the residue of the estate, specifically devised to others.

Decree affirmed.

OPINION OF THE COURT, BY PRESTON, J.

ON appeal from the Chancellor.

The nature of the case appears in the following decision of the Chancellor, which is appealed from :

DECISION OF THE CHANCELLOR BELOW.

This is a bill in equity alleging substantially that plaintiff is the daughter and sole heir-at-law of Theophilus Metcalf, who deceased in August, 1866, leaving real and personal estate in this Kingdom, which he disposed of by will duly admitted to probate; that under the directions of the will, all the real and personal property, devised and bequeathed to plaintiff, was sold to pay the debts due from the estate of the testator and no part remained for distribution to the plaintiff; that a specific devise of certain real estate (fully described in the bill) was made in the said will to Frank Metcalf, defendant, for life with remainder to his surviving children, and, on failure of issue, to defendants, Helen Rowland and Julia Prosser; that defendant, Frank Metcalf, has minor children, named in the bill; that plaintiff, though the sole lawful heir of Theo. Metcalf, was, by reason of the carrying out of the said will and the sale of all the property devised to her to pay testator's debts, deprived of every part of the property or interest in the property belonging to her father at the time of his decease; plaintiff married in 1867 and remained under coverture till 1881, when her husband died and she has not married since; that on the 14th of October, 1885, the interest of Frank Metcalf in the lands devised to him as above set forth was sold at public auction to Andrade, Hayselden, Kidwell and Henson, defendants, and another parcel on Beretania street was previously sold by F. Metcalf as administrator *de bonis non* of T. Metcalf, to L. Aseu, defendant; that these sales, except the last, were without validity to pass the fee, as Frank Metcalf had only a life interest in the same. The bill prays for the appointment of a guardian *ad litem* for the minor respondents and that such share of the property devised and bequeathed to Frank Metcalf be awarded to plaintiff as to the Court shall seem equitable, etc.

The attorney *ad litem* has filed a demurrer and plea and the other defendants have either demurred or answered.

These demurrers raise the question whether, since the specific devise of the plantation of Kaupakuea to the plaintiff was charged with the payment of the testator's debts and the same sold for this purpose, the plaintiff as specific devisee is entitled to exoneration out of the lands devised to the other specific devisees.

I have searched the books in vain to find authority to sustain the view contended for in the bill. I think the right of a specific devisee to marshal the assets as against the heir of the descended estate is clear, following the general rule that assets are to be applied in the following order, (first) the personal estate, not expressly nor by implication exempted; (second) lands specifically devised to pay debts; (third) estates descended to the heir; (fourth) devised land, charged with the payment of debts generally; (fifth) general pecuniary legacies *pro rata*; (sixth) specific legatees *pro rata*; (seventh) real estate devised, whether in terms general or specific.

2 Leading Cases in Equity, 326; *Hays vs. Jackson*, 6 Mass., 149.

But I am unable to find a case where, the personal estate having been first exhausted, and the real estate, specifically devised and charged with the payment of debts generally, being next taken for this purpose and sold and the debts discharged, that the devisee of this portion of the estate has the right to be reimbursed from the portion of the other specific devisees.

For this reason I think the demurrer should be sustained.

The other points made I have not considered, as being unnecessary.

In support of the appeal, Mr. Neumann contended (*inter alia*) that under established rules it is not sufficient that one part of the estate should be charged (*with the debts*) and all the rest exonerated, unless such exoneration is stated in the will in express terms. Story's Eq. Jur. 572, 573 and 574.

This is not the case here. By this will, T. Metcalf under the impression, evidently, that he had devised the most valuable part of the estate to the plaintiff, charged not only the debts but also legacies upon the proceeds of the estate devised to plaintiff.

Counsel further contended that nearly all the adjudged cases go to the extent that the charge of debts upon a specific devise does not imply an exoneration of the other portion of the estate unless there is an express provision for such exoneration.

A part of the residue of the estate, Mr. Neumann urged, is in the same position in which it was when the will went into effect; that that part, at least, should be made to contribute in proportion to make good in a measure the loss of her entire inheritance to the heir.

Counsel also contended that, although there might be no direct authority for the granting of the relief sought, still no case could commend itself more strongly to a favorable consideration by a Court of Equity.

Story's Eq. Jur., 566, 566a and 570, and cases there cited. Redfield on Wills, p. 365, note 33, 3rd ed.

BY THE FULL COURT.

If by the "residue of the estate" is meant the residuary estate devised by the will, the plaintiff has not claimed to be exonerated therefrom by her Bill, neither has she made the residuary devisees (the Trustees of Oahu College) parties, and, therefore, we cannot consider whether she is entitled to be so exonerated.

If plaintiff's counsel only means the lands devised to the defendant, Frank Metcalf, then the point is covered by this decision.

The contention made by the plaintiff's counsel that the intention to exonerate should be stated in the will, in express terms, is too broad. It is sufficient if "a manifest intention" appears (Story's Eq. Jur., 571) and we think such a manifest intention is apparent in this will.

The plaintiff has failed to convince us that there is any authority to support the claim set up by the bill or that the decision appealed from is incorrect.

We therefore affirm such decision and dismiss this appeal with costs.

P. Neumann, for plaintiff.

J. A. Magoon, for minor defendants and Mrs. Prosser.

Ashford & Ashford, for other defendants.

Honolulu, July 30, 1886.

G. H. LUCE, Tax Collector of Honolulu, vs. CHIN WA *et al.*

APPEAL FROM INTERMEDIARY COURT.

JULY TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

There is no appeal from a judgment by default.

OPINION OF THE COURT, BY McCULLY, J.

In the Police Court of Honolulu, the defendants were defaulted for non-appearance on the return day and hour, and upon proof on the plaintiff's part, judgment was entered for the plaintiff.

The defendant, later in the day, took an appeal from this judgment.

On appeal, the Intermediary Court held that an appeal did not lie from a judgment by default, and an appeal was taken up to the Court in banco. This is the question now submitted to this Court.

This involves the construction to be given to the phrases in Section 1005: "Any party deeming himself aggrieved by the decision of any police or district justice in any case, whether civil or criminal, may appeal," etc. Section 835 provides that the summons shall contain a notification to the defendant that, if he fails to attend at the time and place of trial designated, judgment will be rendered against him *ex parte* by default. The affidavit of defendant's counsel, presented in the Intermediary Court, sets forth that, on the day set for the trial of the cause, he attended at the Police Court a few minutes after 9 o'clock a. m. That, on his reaching the Court-room, the Police Justice had called this case, before calling the criminal docket, which was contrary to the rules of the Police Court, and had already entered judgment for plaintiff herein, entering no appearance for defendant; that he, affiant, asked that the judgment be vacated and the case tried on its merits, stating that defendant had a meritorious defense; that the Police Justice replied that plaintiff herein had not time to attend the trial, and that an appeal to the (Inter-

mediary) Court would give defendant opportunity to set up his defense.

From the affidavit we infer that due service had been made on the defendant; that the case was within the jurisdiction of the Police Court; that the complaint was not defective, and that no motion to remove default was made or denied. The case of *Hal-leck vs. Jandin*, 34 Cal. 167, is much relied on to support the appellant. The language of the Court is, that "as to the right of appeal, there is no distinction between judgments by default, and judgments after issue joined and a trial. The former is as much a final judgment as the latter, and the statute gives a right to appeal from all final judgments without distinction. From this it follows that all errors disclosed by the record can be reviewed and corrected on an appeal from the former class of judgments, as well as the latter."

The Court in this utterance supports itself by no authority. It is in contravention to the current of previous judicial findings of the same State, but it does not express itself as overruling them. Mr. Justice Field, then Chief Justice Field, says, in *Mott vs. Smith*, 16 Cal. 555: "To entitle objections to consideration here, they must be presented to the Court below in the first instance, at least, if they are of a character which might have been then obviated by the production of other evidence."

In *Guy vs. Ide*, 6 Cal. 99, the Court say: "When a remedy is so perfectly attainable in the Court of original jurisdiction, an appellate Court will not administer it for any cause that can be assigned."

The cases of *Holman vs. Stigourney*, 11 Met., 436, and *Ball vs. Burke*, 11 Cush, 80, more explicitly support the appellant's contention. The revised statute of Massachusetts amended the old statute by striking out the words, "in which any issue has been joined;" and the Court in these cases held that appeal lay from a judgment on default, and for non-suit. A reason given is that the judgment upon a default may be for a sum too large or too small, or may be rendered for causes of action not embraced in the Court—matter which may be corrected upon an appeal. The Massachusetts Courts are bound by the express Legislative interpretation given to the statute by the amendment, and the Commissioners' notes indicating that purpose.

Upon reason it is not satisfactory to hold that a party by merely suffering a default in the Court of original jurisdiction, may, in the form of an appeal, take his case for trial before the appellate Court. The theory of appeal is to afford a re-trial in a superior tribunal, which may correct errors of law, and findings of fact, as made in the lower Court. The plaintiff has a right to a trial upon issue joined in the original Court. If judgment is then rendered against him, he may choose to proceed no further, and risk no increase of costs. If the defendant, being duly summoned, does not appear, he seems to plead *nolo contendere*. He consents to a judgment for the plaintiff, if he can make his case *ex parte*.

Until the default is removed it is as complete when first ordered as if the defendant did not appear at any time thereafter. The reasons, if any exist, for the removal of a default, should be presented to the Court which has ordered it. Under the appellant's claim of appeal, a default may be suffered without danger. The jurisdiction of the Court, to which the defendant is legally summoned, may be ousted in every case. We cannot hold, even upon the authorities cited, that this is a reasonable construction of the statute. A line of New York authorities support the view that an appeal does not lie from a judgment rendered on default.

In *Dorr vs. Birge*, 8 Barb., 351, the reasoning of the Court is, "the jurisdiction of this Court is only appellate. It can only review the decisions of the County Court. If a party to the appeal to the County Court may suffer a default, and there and then appeal to this Court, it would be equivalent to appealing in the first instance directly from the judgment of the Justice of the Peace to this Court."

Gelston vs. Hoyt, 13 Johns., 561, is strong authority for this view; other authorities are *Sands vs. Hildreth*, 12 Johns., 493; *Harvey vs. Cuyler*, 17 Johns., 469; *Colder vs. Knickerbocker*, 2 Cowen, 31.

In 20 Johns., 283, *Adams vs. Oaks*, the language of the statute gives an appeal to "every person who shall think himself aggrieved by an order of any Justice." The Court, per Nott, J., say: "To allow the defendant, by suffering a default to pass by

the Justice's Court, would prevent the right of appeal, which implies an actual previous litigation in the tribunal appealed from. It would convert the appellate Court into one of original jurisdiction. A judgment by default for want of appearance is, for this purpose, equivalent to a judgment on confession." In the view which we adopt, an appeal is not to be allowed in this case.

A. Rosa, for the plaintiff.

W. R. Castle and *H. E. Avery*, for the defendant.

Honolulu, July 31, 1886.

L. AHLO, as father of LU NGACK, a minor, vs. MUNG HUL
EXCEPTIONS OF REFUSAL OF McCULLY, J., TO GRANT A NEW
TRIAL.

JULY TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Defendant, in Ejectment, claimed under a deed alleged to have been burnt; the verdict was for plaintiff; defendant moved for a new trial, claiming that he was taken by surprise by evidence of his witness.

Held, that the refusal to grant a new trial was proper; for, even supposing the witness should testify as expected, the evidence as to the execution of the burnt instrument is very vague; and as, according to the plaintiff's evidence, the instrument was a will, and not proved within five years from death of testator, it would have no effect against the heirs.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

THIS is an action of Ejectment brought to recover one undivided moiety of a piece of land situated in Waipio, Ewa, Island of Oahu.

At the trial before McCully, Judge, and a foreign jury, at the last April Term of the Court, the plaintiff proved title by pur-

chase from one Kalukini (k), a son and one of the heirs-at-law of Nahuina, the patentee of the land.

The defendant claimed title under one Alali, the eldest son of the patentee, who claimed under an alleged unrecorded deed from his father, and which was said to have been burnt.

To prove the contents of the alleged deed, Alali was called and testified, (*inter alia*) "The paper contained the following: 1st, I hereby bequeath to you, Alali, my lands for you to have control over and to care for your younger brothers and to share with them the receipts of the land."

The defendant also called one Kalua, who was said to be one of the witnesses to the said deed, but he denied knowing anything about it, and denied having told the defendant's attorney that he did.

A verdict was rendered for the plaintiff, and the defendant subsequently moved for a new trial on the ground that he was taken by surprise by Kalua's testimony.

The application was supported by an affidavit by Kalua, stating that he had been persuaded to give false testimony and that he saw the intestate execute the instrument, also by an affidavit by Mr. Magoon, defendant's attorney, to the effect that he relied upon Kalua's testimony, and had not, therefore, sought for other testimony, and that if a new trial is granted he will be able to establish the contents of the instrument.

The motion for a new trial was denied and exceptions were duly taken.

BY THE COURT.

The evidence as to the execution of the alleged burnt instrument is very vague, even supposing the witness Kalua should testify as expected.

The testimony of Alali is presumptive that the instrument was a will, and as it was not proved within five years from the death of the testator, it would have no effect against the heirs.

Upon a review of the whole testimony, and considering that the witness Kalua is very illiterate, being unable to write, we are

not disposed to differ from the decision of the presiding Judge, and, therefore, the exceptions are overruled with costs.

W. R. Castle, for plaintiff.

P. Neumann, J. A. Magoon and A. Rosa, for defendant.

Honolulu, July 31, 1886.

J. H. WOOD *vs.* B. F. DILLINGHAM.

APPEAL FROM THE CHANCELLOR.

JULY TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

Plaintiff agreed to sell to defendant the "Nuuanu Dairy property, containing an area of 650 acres, more or less;" after defendant took possession, he found that the area was only 258 acres, and claimed a proportionate reduction on the purchase price, which plaintiff refused to allow; plaintiff files a bill for specific performance.

Held, that when the purchaser is willing to take a less quantity of land than the contract calls for, he is entitled to a *pro rata* reduction in price, and the words "more or less" will not cover such a deficiency as exists in this case; but the defendant, having sold the property soon after his purchase of it, to a corporation of which he was President, at a large advance on the price agreed to be paid by him to plaintiff, held, affirming the decree of the Chancellor, that defendant may elect whether specific performance of the contract shall be decreed without compensation, or whether the sale shall be annulled and plaintiff pay defendant the enhanced market value of the property by reason of the permanent improvements placed thereon by defendant, less rent.

OPINION OF THE COURT, BY PRESTON, J.

THIS is a suit for the specific performance of an agreement for the purchase of the property known as Wood's Dairy.

This case was heard by the Chancellor on March 16th, 17th, 24th, and April 1st of the present year, who rendered the following decision:

DECISION OF THE CHANCELLOR, BELOW.

This is a bill in equity to compel the specific performance of a contract for the sale of land.

The substance of the bill is as follows : That on the 31st of December, 1883, the plaintiff agreed in writing with defendant to sell, and defendant agreed to purchase the Nuuanu Dairy property situate in Nuuanu Valley, described in certain conveyances which are set out in the bill ; that on the execution and delivery of the agreement, defendant paid plaintiff the sum of \$1,000 as part of the purchase money and entered into possession of the premises, and he and those claiming under him have ever since and now have possession of the same ; that in accordance with this agreement, plaintiff tendered defendant a deed of the premises on the 1st of July, 1884, but owing to a defect in the plaintiff's title to a portion of the premises, a release and quit claim was necessary to be obtained from the Hawaiian Government which was not obtained till the 28th of August, 1885, but defendant assented to the delay, declining to accept the deed until the complainant's title had thus been perfected ; that on the 25th of November, 1885, plaintiff tendered defendant a good and sufficient deed of the premises complying with the terms of the agreement, and is now willing to give defendant such deed upon his paying the part of the purchase money, amounting to \$7,000, and interest due amounting to \$2,584 60, and securing the balance of the purchase money, \$10,000, as provided in the agreement ; that defendant refused to accept the tender of the deed made on the 25th of November, 1885, and now refuses to accept it or to pay the purchase money, or to comply with plaintiff's request to execute his agreement. The bill prays that defendant be compelled to specifically perform his agreement, etc.

The answer admits that defendant entered into the agreement of the 31st of December, 1883, to purchase the Nuuanu Dairy property, including real estate and buildings, but denies that the contract contains any reference to the deeds of Vincent and others which are set out in the bill and says that the contract calls for a conveyance of six hundred and fifty acres of land, more or less, and contains no other description by which said area could be limited ; that the purchase price named in the contract

was determined by the acreage therein set forth; that plaintiff represented to defendant that the premises contained at least six hundred and fifty acres, and led defendant to believe it contained more; that during the negotiations the parties figured upon the value per acre, and plaintiff represented the area to be six hundred and fifty acres; that since the date of the contract the defendant has had a survey made of the premises and avers that they contain only 258 acres; the plaintiff has been in possession of the premises since March 18, 1861, and well knew, or had the means of knowing, the actual area of the premises; that the deeds of the plaintiff, named in the conveyance tendered, call for only 301 16-100 acres, of which a portion had been sold by plaintiff; that defendant was not acquainted with the area or extent of the premises and signed the contract relying on the representations of the plaintiff that they contained 650 acres, more or less, and that said false representations were fraudulently or mistakenly made by plaintiff. The answer admits the payment of \$1,000 on account of purchase money and that defendant has been in possession since January 1, 1884. The allegation in regard to delay to obtain a quit claim from the Hawaiian Government, and defendant's assent to the delay, is admitted. The tender of a good and sufficient deed on November 25, 1885, or at any time, is denied and it is averred that the deed tendered did not include more than 258 acres, and plaintiff has not offered to make said acreage of 650 acres. That defendant bought the premises for the purpose of carrying on a dairy on the same; That it was of great importance to defendant to obtain the number of acres mentioned in the contract to afford sufficient pasturage to keep up respondent's business, all of which was well known to complainant when he signed the contract; that defendant, relying upon the false representation that the premises contained 650 acres, has expended the sum of \$9,461 69 on buildings and improvements on the premises, and has built one barn more than was required for all the cattle that 258 acres of land could support, and has had to obtain other land to make up said area; that defendant is willing to carry out his contract upon plaintiff's tendering him a deed of 650 acres of land, or thereabouts, and is now willing to take all of said premises which plaintiff is able to convey, upon a pro-

portionate reduction being made for deficiency in area below the amount called for by said contract, and to pay the balance in cash. All other allegations are denied. The answer prays that the bill be dismissed with costs upon defendant paying such sum as may be found due after allowing a proportionate deduction from the purchase price for the said deficiency in area.

BY THE COURT.

The evidence taken is voluminous and only such parts of it as are essential will appear in the opinion. The case is a difficult one, presenting many complications, not only upon the facts, but as regards the relief which would be equitable to both the parties.

It is clearly established by the evidence that the plaintiff, though he had owned the premises since March, 1861, had not had it surveyed, nor did he know its area, it having been described to him by his vendor, C. W. Vincent, as being a mile square, and he so represented it to defendant. It is an estate known in this community and commonly called "John Wood's place," or "the Nuuanu Dairy." It is in sight from the road leading to the Pali and its boundaries are certain. These were pointed out by plaintiff to defendant, who visited the premises frequently. It is bounded on one side by the main road, on the opposite side by the top of the ridge, on the side towards town by Queen Emma's place, on the upper side by the Luakaha premises. Mr. Gay, who surveyed the land for defendant, says that it is about three hundred feet short of a mile long on the road and about the same length on the ridge, and is so situated as to deceive an observer as to its area, looking much larger than it really is; that he could form no accurate idea of its size without measuring it, and that it might well appear to be a mile square, or 640 acres.

I think it is well established that Mr. Wood supposed it to be a mile square and that he made no fraudulent misrepresentations as to its area to the defendant.

The description in the contract of the property to be sold is as follows: "The Nuuanu Dairy property, including real estate and buildings; said real estate contains an area of 650 acres, more or

less." The price was \$18,000, \$1,000 in cash and the balance in deferred payments.

The question is whether defendant is entitled to a conveyance of all the land that vendor can give (258 acres) with an abatement of the purchase money for so much as the quantity falls short of that mentioned in the contract. Numerous authorities, both English and American, have been cited by counsel on both sides.

Chancellor Kent, in his Commentaries 4, p. 466 and 467, says: "The mention of quantity of acres after a certain description of the subject by metes and bounds, or by other known specifications, is but a matter of description, and does not amount to any covenant or afford ground for breach of any of the usual covenants, though the quantity of acres should fall short of the given amount. Whenever it appears by definite boundaries or by words of qualification as 'more or less' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no admixture of fraud in the case."

One of the more recent cases bearing upon this question is that of *Noble vs. Googins*, 99 Mass., 231 (1868), where the previous cases are largely cited and commented upon. This learned Court per Gray, J., says: "It has since been declared by a great weight of authority, in accordance, we think, with the soundest reason, that in an agreement for the sale and purchase of land for an entire sum either a description of the land by its boundaries, or the insertion of the words 'more or less,' or equivalent words, will control a statement of the quantity of the land or of the length of one of its boundary lines, so that neither party will be entitled to relief on account of deficiency or surplus, *unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract.*"

The case before the Court was an action of contract for balance of price for the purchase of a wharf lot in Boston. The defendant claimed an abatement from the stipulated price for a deficiency in the quantity of land. The land was described as a wharf lot on Border street, bounded on one side by the ship-yard of Paul

Curtis, and on the other side by that of Donald McKay, and as measuring about 220 feet on Border street, more or less. The land actually measured only 170 feet on Border street. The case is stronger for the defendant than the one now before me, for, as the Court say, the land was stated to be bounded on either side by ship-yards, in the occupation of persons named, the limits of which would apparently be manifest upon looking at the premises.

The Massachusetts Court refer to the case of *Hill vs. Buckley*, 17 Vesey, 394 (1811), in which Sir William Grant, M. R., held that the general rule of specific performance was that the purchaser shall have what the vendor can give, with an abatement of the purchase money for so much as the quantity falls short of the representation. This case is relied on by the counsel for defendant in the case at bar. The contract of sale called for the "Kestle Woods, including the Gulberry Marsh, containing 217 acres and 10 perches." It fell short by about 26 acres. No deception was intended, and the Master of the Rolls says: "When a representation has been made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase money for as much as the quantity falls short of the representation. That is the rule generally, as though the land is neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain, therefore a rateable abatement of price will probably leave both in nearly the same relation in which they would have stood if the true quantity had been originally known." As the purchaser had got the quantity of wood which he bargained for, the Court awarded an abatement for the value of twenty-six acres of land, deducting the value of the wood on it.

The Court, in the Massachusetts case (99 Mass.), thought that the authority of this case was shaken by a later case (*Winch vs. Winchester*, 1 Ves. and B., 375), from the same Judge, in which he

declined to order an abatement in the purchase price for a deficiency of five or six acres, where the sale was of "41 acres more or less," and the vendor did not know the true quantity, and made no other representation what it was.

It seems to me that the amount of the deficiency in each case has a very great influence upon the Court in settling the question as to abatement.

In *Belknap vs. Sealey*, 14 N. Y., the Court of Appeals held that a Court of Equity will rescind an executory contract, on the application of the vendee, for the purchase of land on the ground of mistake in quantity, notwithstanding the premises are described by metes and bounds, and the terms "more or less" added after a statement of the quantity, where the mistake on the part of the purchaser was caused by the misrepresentation of the vendor, although not fraudulently made, and when the mistake so essentially affected the value of the premises "that the contract would not have been made if it had existed." The land was described by metes and bounds, and as containing eight acres "more or less." The actual quantity was four acres. An abatement in price was not claimed, but the vendee asked to have the contract rescinded. The Court say: "A deed which describes the land, and states the number of acres, although with the words 'more or less,' clearly imports that there is not a great deficiency or excess. If the deficiency is one-half, the instrument carries on its face a gross misrepresentation." The Court based its opinion on the ground that the contract was still executory, and that equity ought to relieve against a contract where the mistake is so material as to go to the foundation of the agreement.

Judge Story's opinion in *Stebbins vs. Eddy*, 4 Mason, 414 (1827), is much quoted in subsequent cases, and is relied upon by the plaintiff in our case. He says: "There is much good sense in holding that the words 'more or less,' or other equivalent words used in contracts or conveyances of this sort should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus; nor am I prepared to admit that the fact that the sale is not in gross, but for a specific sum by the acre, ought necessarily to create a difference

in the application of the principle. I do not say that cases may not occur of such an extreme deficiency as to call for relief, but they must be such as would naturally raise the presumption of fraud, imposition or mistake in the very essence of the contract."

I have examined the following cases cited by counsel on both sides: *Belden vs. Seymour*, 8 Conn., 19; *Morris vs. Emmett*, 9 Paige, 167; *Powell vs. Clark*, 5 Mass., 355; *Jackson vs. Barringer*, 15 Johns., 470; *Perkins vs. Webster*, 2 N. H., 287; *Marvin vs. Bennett*, 26 Wend., 168; *Weart vs. Rose*, 16 N. J. Eq., 291; *Gilman vs. Riopelle*, 18 Mich., 164; *Mann vs. Pearson*, 2 Johns., 86; *Jackson vs. Moore*, 6 Cowen, 706; *Stanley vs. Green*, 12 Cal., 164; *Cabot vs. Winson*, 1 Allen, 546; *Couse vs. Boyles*, 4 N. J. Eq., 212; *Miller vs. Chetwood*, 2 N. J. Eq., 199; *Cross vs. Eglin*, 2 B. & Ald., 106; *Whittemore vs. Whittemore*, 8 L. R. Eq. Cas., 608; *Davis vs. Shepherd*, 1 L. R., Ch. App. 310; *Milkman vs. Ordway*, 106 Mass., 282, and find nothing especially varying from the above cases.

To apply the principles of law to the facts as I find them :

The contract was for the sale of the "Nuanu Dairy" property, including real estate and buildings, said real estate containing an area of 650 acres, more or less." The fact that it is not described by metes and bounds is not decisive of the case in favor of the defendant.

In *Haley vs. Amestoy*, 44 Cal., 182, the land was described by name—the Rancho de San Vincent, and the Court held it was well described thus, and the particular description by measurement and boundaries did not restrict it. As we have seen in the case of the 14 N. Y. and 99 Mass., the fact that the lands were definitely described by metes and bounds, or other certain description, is not necessarily fatal to the relief of the purchaser, nor is their absence of itself sufficient to make the vendor liable for the full amount in case of shortage. The presence of the qualifying words "more or less," will not, of themselves, relieve the contract from the presumption of mistake in the essence of the contract, where the deficiency is so great as to raise the presumption.

Was the amount of land in the Nuanu Dairy property of the essence of the contract? I think it was. The amount of acreage

was mentioned in the correspondence between the parties. (See letter of Dillingham to Wood, 28 December, 1883) and the capacity of the place for a dairy was the subject of discussion between them. The discrepancy between 650 and 258 acres is so great as to raise a mistake in the essence of the contract. I think it is very evident that both parties supposed the property to have been about the area of 650 acres.

If the simple rescission of the contract of the sale would place the parties where they were when negotiations were concluded, I would not hesitate to annul the contract, on the ground of mutual and gross mistake.

But immediately on the signing of the agreement, Dillingham took possession of the premises and put the cows of the Woodlawn Dairy upon it and commenced the erection of extensive barns upon the premises. He did this before he had the premises surveyed. Soon after the Surveyor, James Gay, commenced his investigations, and in April or May became convinced of a considerable shortage from the supposed area. This he communicated to Mr. Wood, and presumably to Mr. Dillingham, though there is no exact evidence as to when he did so. On July 5, 1884, Mr. Dillingham made a proposition to the Woodlawn Dairy and Stock Company, a corporation engaged in dairy business, in which Mr. Dillingham was the largest stockholder, to sell to it the Nuuanu Dairy, or Wood Ranch, for \$57,500, with the improvements made by him, and certain live stock, and future improvements, to cost in all \$15,000. This was accepted by the Company, as appears by the minutes of that date. Whether Mr. Dillingham was then aware of the shortage in area or not does not appear exactly. Mr. Wood says that about that date he tendered Mr. Dillingham a deed of the property, which Mr. Dillingham declined on the ground of the deficiency in area, and claimed a proportionate reduction in the purchase money. The minutes of the Woodlawn Dairy Company recording apparently a statement of Mr. Dillingham, read: "The removal of the stock from the dairy at Punahou to the new one at Nuuanu Valley, at the Wood Ranch, has, upon a trial of six months, proved a success. The cost of feeding stock has lessened, etc." And on September 14, 1884, the transfer was made by an executory

agreement of sale, in which, though the acreage is stated to be 258 acres, the original price as agreed upon was not thereby reduced, except that Mr. Dillingham says his expenditure for live stock and improvements which he passed over to the company amount to about \$22,000, which would reduce the purchase price of the premises to the Woodlawn Dairy Company to about \$35,500. I am convinced by Mr. A. H. Smith's testimony, as well as by the acts of Mr. Dillingham in building the barns immediately after January 1, 1884, and putting the cows of the Woodlawn Dairy there before he had procured a title to the place, that he intended the purchase in the first place to be for the Woodlawn Dairy. He has thus put it out of his power to reinstate the vendor in the position he was in when the negotiations were concluded.

The defendant contends that as the additional land to make up 650 acres cannot be furnished, he is entitled to have an abatement in the contract price of \$18,000, which for 650 acres would bring the price of one about \$28, and Mr. Dillingham having only received 258 acres, at \$28 he would have to pay something over \$7,000 for the bare land, and an additional sum of say \$1,500 to \$2,000, for the houses and improvements that stood on the land when he bought it, equal in all to about \$9,000, or one-half the price he originally agreed to pay for it.

I think it would be harsh and decidedly inequitable to make Mr. Wood sell his land for half what he expected to get for it and what he valued it at and what, for all that appears, it is reasonably worth.

The case of *The Earl of Durham vs. Legard* is well in point here. This was a case where A agreed to sell B an estate which was supposed by both parties, and was stated in the agreement, to contain 21,750 acres, but in fact contained only 11,814 acres, and it was held by Sir John Romilly M. R. upon a bill filed by the purchaser, that he was not entitled to specific performance of the contract with compensation. In the case, said His Honor, of *Hill vs. Buckley*, 17 Vesey, 394, which is usually cited upon these occasions, Sir William Grant laid it down that "where there is less land than was agreed to be sold, the ordinary mode of settling it is to ascertain the quantity and take it rate-

ably; if that were done here, the plaintiff would get an estate which he had intended to buy for £66,000 for about £33,000. If that principle were to be followed in the present case it is clear I should be doing great injustice. I am of opinion that this is a case simply of mistake, and that the purchaser is not entitled to any compensation. The plaintiff must elect whether he will perform the contract without compensation or have the bill dismissed." 34 Law Journal (Ch.) N. S., 589. We have not this report, but I find the case cited in *Leading Cases in Equity*, Vol. II. Pt. II., 4th Am. ed. *550, *551.

I think the case before me is no different for the reason that the vendor and not the purchaser seeks specific performance, for the purchaser in his answer, which might have been a cross bill, asks just this relief.

In the Earl of Durham's case the land had in all probability not been taken possession of by the purchaser nor improved by him, so a dismissal of the bill, if the purchaser so elected, would annul the contract and leave the parties where they stood if the true quantity had been known. As I have said before, our case is complicated by the improvements put on the premises by the defendant and by its sale to the Woodlawn Dairy Company. It would be inequitable to compel Mr. Wood to take his land back and pay the full amount laid out by Mr. Dillingham on improvements for which Mr. Wood has no use and which were erected for the special use to which the premises have been devoted by defendant during the past two years. It is not at all probable that these improvements enhance the market value of the place to anywhere near their cost. On the other hand, to rescind the sale, defendant to take off his improvements, would be unjust to defendant and entail a great and useless waste of property. Each case of this character must be decided according to its own peculiar circumstances.

After much reflection I am of the opinion that the defendant should be allowed to *elect* whether specific performance of the contract shall be decreed without compensation, since he has sold the premises for double that he contracted to pay for it, or whether specific performance shall be refused and the agreement of sale annulled, the plaintiff to pay defendant the amount of

the enhanced market value of the premises by reason of the permanent improvements placed thereon by defendant, less rent, to ascertain which a reference may be had to a master.

On the question of the power of the Court to award damages where specific performance of the contract is not decreed, I refer to *Milkman vs. Ordway*, 106 Mass., 232.

Each party is to pay his own costs. Costs of Court to be divided. Decree accordingly.

Honolulu, May 1, 1886.

From this decision the defendant appealed, which appeal was heard on the 12th inst.

S. B. Dole, for the appellant.

There is an important variance between the allegations in the bill and the proof. The defendant was told there was 650 acres; he bought on the faith of the representation; he required the land to enlarge business. What he could get for it is not the question; he bought 650 acres and should not pay the full price for less than one-half; he improved the property, and at the time of the discovery of the deficiency he could not withdraw; he owned seven-eighths of the Woodlawn Dairy stock, and the capital was increased from \$42,000 to \$100,000; he had put improvements, cattle etc., upon the land to the amount of \$22,600; by putting up the capital, the stock was depreciated to \$75. The plaintiff is responsible to make up deficiency. Deliberate fraud is not charged, but a willful reluctance to ascertain quantity; he had deeds in his possession for over twenty years, and could have ascertained the area if he had looked at them. It is a general principle that the grantor is responsible for deficiency. The case of *Earl of Durham vs. Legard* is contrary to the authorities and should not be acted upon here. The modern English decisions are against the general principle.

W. A. Kinney, for the complainant.

The defendant has the advantage of the plaintiff; he asks for affirmative relief as if he were plaintiff. Technically, this is an executory contract; practically, it is executed.

The case is, what relief is appropriate. If fraud, the remedy

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is positive. It is a case of mutual mistake; the defendant is to be recouped what he has actually suffered.

Constructive fraud is raised here, but not below. It is said plaintiff should have discovered area from perusing title deeds. The deeds were handed to defendant's solicitor to prepare agreement; he might have ascertained area. What damage has defendant sustained? Shows he has lost nothing; he sold the property according to the exact measurement for more than the contract price. He has settled the value himself. *Earl of Durham vs. Legard* is precisely in point.

W. A. Whiting on same side: The Corporation issued the 100,000 shares, not defendant. \$57,500 worth was issued for the property, including improvements and stock; \$35,500 was paid to the defendant for this land: he has made money out of it.

Mr. Dole in reply: The purchase by the Corporation has nothing to do with the case; the defendant expected 650 acres, and it would be unjust to compel him to take less than one-half for the full price. Abundant authorities to show that purchaser should only pay *pro rata*; no one except plaintiff should be punished for his looseness: he should only be paid for what he receives. The Woodlawn Dairy interests are not to be sacrificed here.

BY THE FULL COURT.

This case is complicated by the dealings of the defendant with the land in question.

The material facts of the case are substantially stated in the opinion of the Chancellor, and need not be referred to, except so far as it may be necessary to allude to them in dealing with the arguments of counsel. It is well established that in cases of this nature, when the purchaser is willing to take, and insists upon taking, a smaller quantity of land than the contract calls for, he is entitled to a reduction *pro rata*, whether the land is sold by the acre or not, and that the words "more or less" will not cover such a deficiency as exists in this case; and in these respects the arguments of counsel for the defendant are justified. The learned Chancellor did not dispute the general law, but held that the peculiar circumstances of this case rendered it inapplicable. Counsel for the defendant contends that the complainant is responsible

for the deficiency because of his willful reluctance to look at the title deeds, which he had in his possession for twenty years, without ascertaining the quantity of land.

We think the complainant's testimony entirely removes this objection; there can be no doubt he always understood the land contained a square mile, and no person from a mere inspection of those deeds could ascertain the extent of the land. If a person could, by such an inspection of the title deeds, ascertain the extent of the land, it may be fairly argued that the defendant had constructive notice of the extent, as the deeds were placed in the hands of his solicitor to prepare the agreement for sale.

It is also contended that the decree made by the Chancellor cannot be carried out, as it would prejudice the Woodlawn Dairy Company who are in possession. This renders it necessary that the Court should consider the transactions between defendant and such company. The answer of the defendant does not disclose the fact that the defendant had sold the property to the Woodlawn Dairy Company, and such fact only came out during the hearing. In fact, the defendant by his answer claims relief on the ground amongst others that he had expended \$9,000 in erecting barns and permanent improvements on the land, altogether concealing from the Court the fact that he had been already paid for such improvements by the Company. This cannot improve the position of the defendant in a Court of equity.

The transaction between the defendant and the Company appears to be this; the defendant was and is President of the Company, and agreed with the complainant to purchase the property in his own name, undoubtedly intending to transfer it to the Company, if it should be found suitable for their business, and almost immediately let the Company into possession, transferring cattle from Punahou and placing other cattle purchased from Wood there. He also erected the barns and made other improvements.

On the first of July, 1884, at a meeting of the Company, called for the purpose, it was resolved that the capital of the Company should be increased from \$12,500 to \$100,000 and shares were issued accordingly.

The minutes of the meeting are as follows: "The object of

calling this meeting is to get the views of the stockholders for increasing the property of the company and also for increasing the stock to pay for the same. The removal of the stock from the dairy at Punahou to the new one in Nuuanu Valley at the Wood ranch has upon the trial of six months proved a success. The cost of feeding the stock has been lessened. Four new barns have been built capable of holding, 208, or 52 head each; other improvements have been made; water laid on, etc. Still more improvements are to be made soon, such as new fences, dwelling houses etc., the cost of which will amount to \$15,000."

This statement we understand was made by the defendant.

"On motion of Mr. Dole it was moved and carried that the property i. e. the land of Nuuanu Dairy, the improvements and stock offered to the Company for \$57,500 by B. F. Dillingham, be accepted, and stock be issued to pay for it, and that the capital stock be raised to \$100,000, and that an equivalent amount of new stock be issued." On this showing the defendant would obtain \$42,500 for the property in question.

On the 1st September following, the defendant, having in the meantime discovered the shortage, sold the property to the Company, according to its proper acreage, agreeing to put more improvements upon the land to make up for the deficiency, and, according to the statement put in by him, he at various times up to September, 1885, put stock upon the land, making with the improvements before mentioned a total expenditure of \$42,600, leaving about \$35,000 as the purchase money of the property, the subject of this suit, showing a profit of \$17,000. And in the face of this the defendant claims to be entitled to a reduction of about one-half in this purchase money.

It is not our duty to say more with respect to this transaction, than that it appears that the purchase by the Company was conducted in a loose manner. The Company must have known that the defendant had not a title to the property, and that he had only paid \$1,000 of his purchase money, so that they took this property paying the defendant what was equivalent to cash, he having to pay the balance of \$17,000 and interest before the property would become his or the Company's, no security being taken for such balance, and in fact nothing has been

paid by the defendant since. The Company may have rights in the matter but they cannot be jeopardized by the decree made, and it will be competent for them to appear at any future proceedings.

The case of the *Earl of Durham vs. Legard* we consider to be directly in point, and the principle there and by the decree herein established is anything but new. See *Savage vs. Taylor*, Cas. Temp. Talb. 234. (1735). *King vs. Thompson*, 9 Peters, 204.

We are therefore of opinion that the decision of the Chancellor is correct and must be sustained, but as a considerable sum of principal and interest has accrued due since the commencement of the suit, a reference must be made to a master to ascertain the amount due according to the agreement on the first day of July instant, and in the event of the defendant electing in the terms of the decree, he must pay the amount so ascertained into Court and must execute a mortgage in terms of the agreement for the balance. The complainant must execute and acknowledge a proper warranty deed of the property and deposit the same in Court to be delivered to the defendant, on his complying with the terms of the decree; leave must be reserved for the parties to apply; a copy of this decree must be served upon the Woodlawn Dairy Company so that it may attend on any future proceedings as it may be advised.

The defendant must pay the costs of this appeal.

Appeal dismissed with costs.

W. A. Whiting and Kinney & Peterson for complainant.

S. B. Dole, for defendant.

Honolulu, July 31st, 1886.

J. M. HORNER vs. CLAUS SPRECKELS.**EXCEPTION TO RULINGS OF McCULLY, J.****JULY TERM, 1886.****JUDD, C. J. ; McCULLY and PRESTON, JJ.**

In a planting contract it was agreed that plaintiff should plant anew 200 acres each year, unless it was waived in writing by defendant; in an action by plaintiff for breach, held that a nonsuit was properly directed by the trial justice, because the agreement to plant 200 acres each year was a condition precedent, and plaintiff admitted that it had not been complied with, and there was no evidence of any written waiver by defendant.

Plaintiff alleged in his declaration that defendant agreed to supply plaintiff with sufficient water, in the opinion of defendant or his agent, to enable plaintiff to carry out the contract: held, the burden of proof was on plaintiff to show that the supply of water was not sufficient, in the opinion of defendant or his agent, and that under the pleadings he could not be allowed to show that defendant's agent had not acted in good faith.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

ON exception to the ruling of McCully, J., at trial.

This is an action of assumpsit, and was tried before McCully, J., and a foreign jury, at the last April term, when the plaintiff was nonsuited.

The plaintiff claims the sum of \$31,902 82 for damages accruing to him for a breach of contract as set out in the declaration.

The declaration states that the defendant, on the 19th January, 1880, agreed with one William Y. Horner, that in consideration that said W. Y. Horner should, for the term of seven years thereafter, plant each year at least 200 acres of sugar cane for the defendant upon the island of Maui, upon certain lands designated by the said agreement, and cultivate, irrigate and strip the said cane, and deliver the same to the defendant during the seasons when the cutting of cane is going on, and when the defendant should be ready to receive and grind the same, and perform other

covenants set forth in said agreement, the defendant would furnish to said William Y. Horner from defendant's upper ditch such supply of water as in the opinion of the defendant or his agent should be sufficient for the said W. Y. Horner to carry out the terms of said agreement; and in case of a breakage of said upper ditch, or of excessive drought in the vicinity of said ditch, or if from any other cause the water should be low therein, the defendant would furnish said W. Y. Horner from such ditch such a quantity of water as should be the fair proportion to be distributed to him for the irrigation of the said land, in the opinion of the defendant or his agent, regard being had to the quantity of water flowing in said ditch and the quantity of land to be irrigated thereby. And that the defendant would grind and manufacture said cane into sugar, and deliver to said W. Y. Horner one-half of said sugar during the first year of said term, and one-third thereof thereafter.

The declaration then alleges an assignment by W. Y. Horner to the plaintiff (with the assent of defendant) of an undivided half of his interest in said agreement, and that thereafter, with the knowledge and assent of defendant, the interests of said W. Y. Horner and plaintiff were divided, and the lands cultivated separately.

Breach: That from and after the fourth of March, 1883, the defendant did not furnish for irrigation of said land, planted and cultivated with sugar cane separately by plaintiff, such supply of water from defendant's said upper ditch, or from any other source, as in the opinion of defendant or his agent was sufficient to enable the plaintiff to carry out the terms of said agreement, as applicable to him, and that there was no breakage of said upper ditch, or excessive drought in the vicinity thereof, or any other cause whereby the water of said upper ditch was low during such time as the defendant failed to furnish sufficient water as aforesaid, whereby the plaintiff sustained damages, etc.

Averment of performance of conditions, etc.

At the trial the agreement was produced, and it contains the following stipulation:

"II. During the term of this agreement said party of the second part (W. Y. Horner) shall, during each year of the term

created by this agreement, seed and plant anew at least 200 acres of the land described with sugar cane, unless the so doing shall be waived in writing by said party of the first part" (the defendant).

No evidence was given of any waiver in writing of this part of the agreement, but evidence was given by W. Y. Horner that, "by the earnest solicitation of the defendant, we planted 500 acres instead of 200 first year;" also that defendant and his superintendents and manager did not object to the plaintiff cultivating rattoons instead of planting anew.

The plaintiff gave similar testimony, and it may be taken as proven that the plaintiff's cane suffered from an insufficiency of water.

The plaintiff admitted that except about sixty acres (being all the land he could obtain), no cane was planted after the first year.

The defendant's agent and manager was not called by the plaintiff.

At the conclusion of the plaintiff's case, counsel for defendant applied for a nonsuit on the following grounds:

1. The plaintiff, on his own showing, has not complied with the contract by planting anew two hundred acres of cane each year, or shown any consent in writing for a modification of the contract in this particular.

2. Plaintiff has not proved that defendant has not furnished sufficient water, in the opinion of defendant's agent, to enable him to carry out the terms of the contract.

The Court nonsuited the plaintiff, who duly excepted, and the exceptions were argued on the 10th inst.

S. B. Dole (Jona. Austin with him), for plaintiff.

The contract in this case is a continuing contract to extend over seven years; the planting of the two hundred acres a year is not a condition precedent to the furnishing water for what cane is on the ground; the cane growing during second year should be watered during that year until harvest.

It is not universally true that a party to a contract, who has himself failed to perform some of its provisions, is thereby precluded from recovering damages for a breach committed by the

other party. The question in such cases is, whether the stipulation which the plaintiff has failed to observe was a condition precedent to the performance by the defendant, and whether it is of that character or not depends upon the general scope and intention of the agreement, to be gathered from its several provisions.

Tipton vs. Feitner, 20 N. Y., 423.

The furnishing of water is not dependent or conditional upon the planting of two hundred acres anew each year, and if by reason of failure of defendant to furnish water the plaintiff has suffered loss, he may recover damages for the breach.

But in this case the plaintiff has not in fact committed any breach; the contract on his part has been substantially fulfilled by planting within three years the whole of the six hundred acres, except the small portion occupied by the defendant's buildings which he refused, on request, to remove, and if the cane was not divided into three annual plantings, it was because the defendant urged the doing of it in advance of the time stipulated in the contract, and his act in so urging the planting operated as a waiver of the condition of two hundred acres a year.

Counsel further argued that the acts of defendant and his manager in not objecting to the ratoon crop operated as a waiver, and that a party who has prevented a performance shall not be allowed to avail himself of the non-performance he has occasioned.

The plaintiff, in good faith, relied upon the fairly implied promise that if he would put in as much cane as he could the first year, the so doing should not be taken advantage of by the defendant to his injury.

The defendant suffered and requested the plaintiff to go on after the time limited (the second year, 1881) and thus waived the forfeiture which he might have claimed.

Sinclair vs. Talmage, 35 Barb., 604.

The evidence shows substantial fulfillment of the condition to plant two hundred acres each year by planting the whole six hundred acres within the first three years.

The evidence shows that the plaintiff relied upon the acts and advice of the defendant and his agent to plant all he could and to raise ratoons, as waiving the condition requiring him to get consent in writing to do what they all wanted done.

Any breach of that condition should have been taken advantage of by the defendant at the end of 1881; not having done so he is now limited to a claim for damages for non-performance as to time. No such claim has been made.

The non-performance as to time was caused by the acts of the defendant and his agents, which rendered strict performance impossible within the bounds of reason and common sense.

They cited in support of their contention :

Fleming vs. Gilbert, 3 Johns., 531; *Friess vs. Rider*, 24 N. Y., 869; *Stone vs. Sprague*, 20 Barb., 515; *Mayor, etc., of N. Y. vs. Butler*, 1 Barb., 325, 337; *Young vs. Hunter*, 6 N. Y., 208.

As to the second ground of nonsuit:

The decision of Williams, (defendant's agent) as to the supply of water, was not made in good faith, it was made for the purpose of "freezing out" the Horners. He made his decision at once, on his arrival, without knowing anything about the work, except that he did not want the Horners there. The evidence shows clearly that Williams was an intelligent man, capable of forming a correct judgment; then it shows by undisputed capable witnesses that the water furnished was not sufficient, and it was not the opinion in good faith, of Williams, that it was sufficient.

A new trial should be granted, because while Williams decided that half of the water was enough for rattoons, there is nothing in the evidence to show that Williams thought there was enough to enable plaintiff to carry out the terms of the contract, and the defendant should be required to show this affirmatively.

McClure vs. Briggs, (Vermont) Albany L. J., March 20, 1886, p. 223, and cases there cited.

Paul Neumann, for the defendant.

Article II of the agreement is a condition precedent.

Performance is alleged but not proven.

An attempt to prove waiver was made but it was not proven. It was not pleaded, and cannot be proved if allegation is made that the conditions precedent are fulfilled.

Ratcliff vs. Pemberton, 1 Esp., 35; *Higgins vs. Lee*, 16 Ill., 500; *Chitty on Contracts*, Sec. 1083; *Crockwit vs. Fletcher*, 1 Hurlst. and N., 893.

The contract is of necessity in writing, falling within the

statute of frauds. Such a contract can be rescinded, and rescission proven by parol testimony, but an alteration of the contract, creating new obligations, in fact making a new contract, must be in writing, within the statute.

Chitty on Contracts, 155; *Moore vs. Campbell*, 23 L. J. Exch., 310. (S. C. 26, E. L. and E., 524.)

The contract for the planting anew of two hundred acres every year could only be waived in writing, and no waiver in writing was produced.

BY THE COURT.

In this case no claim of forfeiture arises, and therefore the arguments and authorities used and cited by plaintiff's counsel on that point do not require our consideration.

The case was elaborately argued on behalf of the plaintiff, but in our opinion the points and law involved are quite elementary.

We are of opinion, and the plaintiff by his declaration states, that the performance of article II of the agreement is a condition precedent.

It is unnecessary to consider the question whether the defendant has waived the performance of the condition precedent or not, because if there were any evidence of such waiver by parol (which we greatly doubt) it would not affect this case.

The plaintiff has averred the performance of all conditions precedent, and has not relied on any such waiver as an excuse for non-performance, and, therefore, according to all the fundamental rules of pleading, he cannot be allowed to prove any such excuse or waiver.

The contract declared upon is a contract required to be in writing, and can only be waived in writing. It is true that a performance of a written contract may be varied by parol, but this cannot be where the contract itself would not, by the statute of frauds, have been valid if made by parol, and we therefore consider the defendant's contention on this point to be correct.

See *Marshall vs. Lynn*, 6 M. and W., 110, and cases cited by defendant; *Blood vs. Goodrich*, 9 Wend., 68.

We are, therefore, of opinion that the nonsuit was properly ordered on this point.

On the second ground we are also of opinion that the nonsuit was right.

The burden was upon the plaintiff to prove that the water supplied was "sufficient in the opinion of the defendant or his agent." He has alleged it in the declaration and it is for him to prove it. He contends that the defendant's agent did not act in good faith. This is contrary to his averment, and could not be allowed to be proved under the pleadings.

See *Worsley vs. Wood*, 6 T. R., 710; *Butler vs. Tucker*, 24 Wend., 447; *Walker vs. Orange*, 16 Gray, 193; *Walker vs. Terrill*, 101 Mass., 257.

The exceptions are overruled with costs.

S. B. Dole and Jona. Austin, for plaintiff.

Paul Neumann and F. M. Hatch, for defendant.

Dated Honolulu, July 31, 1886.

KALUA vs. S. SELIG, Administrator.

EXCEPTIONS TO RULINGS OF JUDD, C. J.

OCTOBER TERM, 1886.

JUDD, C. J. ; McCULLY AND PRESTON, JJ.

Plaintiff, a Hawaiian girl, sued defendant as administrator of Ahuna, deceased, for domestic services alleged to have been performed by her for said Ahuna: it was not denied that at the time of Ahuna's death plaintiff was living with him as his mistress:

Held, that although subsequent seduction would not bar the right to recover wages for prior proper domestic service, yet in this action the jury could not give a verdict for plaintiff as compensation for her seduction, it appearing clearly that the original bargain between plaintiff and Ahuna was for her person.

Verdict for plaintiff set aside, and new trial ordered.

OPINION OF THE COURT, BY McCULLY, J.

ASSUMPSIT: Verdict for the plaintiff.

Upon exceptions to the verdict, as against the law and the

evidence, and motion for a new trial, the Chief Justice, holding the term, ordered a new trial. The plaintiff's bill of exceptions to this order, setting forth the evidence given in the case and the instructions in law given to the jury, is the matter before the Court.

The evidence shows that Ahuna, at a date in 1884, went to the mother of the plaintiff, then a girl of fifteen, attending school. In the evidence given by the girl and her mother the phraseology used is that Ahuna wished to engage her to do household and housekeeping work, such as cooking, washing, sweeping rooms, making beds, sewing. The girl and her mother assented and shortly after went to the residence of Ahuna. The mother at that time remained five days, lodging at Ahuna's, occupying a bedroom by herself. The plaintiff, the first night, cohabited with Ahuna, and continued this cohabitation for the two years up to the day of his death. There is no evidence showing that she objected to this in the beginning or at any time afterwards. There is no evidence that she was coerced or was deceived.

She testifies that Ahuna engaged her for a long time; "he didn't mention the number of years; he said I was to live a number of years with him. My mother was paid for Ahuna's injuring me, when I came to live with him, \$100."

The force of the whole evidence is, that she voluntarily did what her mother, with herself, had bargained that she should do: became Ahuna's mistress.

That she did become his mistress, and lived in that character, bearing him one child in his lifetime, is, we believe, not contested by the plaintiff.

There is a conflict of testimony as to the amount of labor which she performed. The weight of testimony, in our view, supports that she did not sustain the character and do the work of a servant; she merely did what the wife of Ahuna might have done.

Ahuna had no wife; the plaintiff was the only female on his premises; there were several men servants, including a cook.

The contention of the learned counsel for the plaintiff is that there was a *bona fide* contract for labor service merely, and that the service was performed, and that Ahuna (and his estate) could not be relieved from his assumpsit by the after seduction of the girl.

The proposition of law is right and is not disputed. If the agreement of the girl did not originally contemplate her becoming Ahuna's mistress, but was for proper domestic service, and such service was performed, a subsequent seduction would not bar the right to recover wages. So the Court charged the jury that "a contract will not be avoided because it may by any probability facilitate an illegal transaction. To render it void, the connection with the illegal transaction must be direct, and not remote or conjectural, but the other services cannot cover up the fornication, if the substantial agreement was to live with him as a mistress."

The verdict of the jury was contrary to the law and the evidence, unless it appeared that there was a contract for service clear of the immoral bargain.

The jury was properly instructed that they could not in this action give the plaintiff a verdict in compensation for seduction.

In view of the evidence given it is apparent that the jury disregarded the instructions.

There was no credible and sufficient evidence to support the verdict upon the only ground upon which it could be given.

It is transparent from the evidence of the plaintiff herself, that the original bargain was for her person, and we should stultify ourselves to find any other conclusion from the euphemistic language of the plaintiff, or from the employment she occupied herself with.

We are of opinion that the trial Justice might properly have ordered, if asked, judgment *non obstante verdicto*.

Upon the same state of facts the same result must follow again, but the form of our judgment must be, that the exceptions are overruled, verdict set aside, and a new trial is ordered.

It is due to the learned Justice who presided at the trial to say that the defendant, desirous of closing the account of the estate, and of getting the verdict of a jury on this claim, waived the objection to a minor's suing for wages.

Paul Neumann and W. A. Kinney, for plaintiff.

S. B. Dole, for defendant.

Honolulu, October 20, 1886.

PUHI vs. MAHULUA.

APPEAL FROM THE CHANCELLOR.

OCTOBER TERM, 1886.

JUDD, C. J. ; McCULLY and PRESTON, JJ.

A bill to set aside a deed, on the ground of fraud and undue influence practiced upon the grantor when in a condition of mental unsoundness, set aside; the evidence, though conflicting, failing to sustain the allegations of the bill.

Decree affirmed.

OPINION OF THE COURT, BY McCULLY, J.

WE take the opinion of the Chief Justice, who heard this case, and from whose decree this appeal is made, for the opinion of the Court, hereby affirming the said decree, and refer, for the statement of the case and the analysis and *resume* of the evidence, to that opinion.

We have carefully examined the evidence, as taken by the Clerk, and consider it in connection with the argument made before us.

In the conflict between the plaintiff's and the defendant's witnesses, we prefer to give credit to the latter.

Their testimony is characterized by statements of circumstances which are particular and probable, consistent and unlikely to be invented.

The conveyance to this defendant, for a small or a nominal consideration, was well supported and reasonable. The allegation of undue influence is without proof.

The decree is affirmed.

A. Rosa, for plaintiff.

W. A. Kinney, for defendant.

Honolulu, October 28, 1886.

OPINION OF THE CHANCELLOR, APPEALED FROM.

This is a bill in Equity to set aside a deed made by one Kaa-naana to the defendant, on the 13th January, 1886, on the ground

that the same was procured when Kaanaana was of unsound mind, and by fraud and undue influence.

It is clearly established that Kaanaana had a stroke of apoplexy on the 26th July, 1885, which left him paralyzed in one-half of his body, and deprived him of the power of articulate speech; that the deed was made while he was still in this condition; and that he never recovered, but died on the 3d March, 1886.

The witnesses for the plaintiff, to wit, the plaintiff, Kamahalaau, Kekilia, Sarah, Naai and Haaheo, say that during all the time of his illness Kaanaana was speechless, unable to indicate his wants, or attend to his person, or feed himself, and was in fact "a body without a soul." Rev. J. Waiamau, who saw him on the day of his attack, and once, a month later, says he was insensible and could not speak on the first occasion, and on the second made no response to witness' questions about his health.

The witnesses for defendant, A. Kaaliko, who drew the deed, W. L. Holokahiki, who took the acknowledgment, Aquai, Kealo, Nalilelua, Makia, and the defendant say that Kaanaana, though speechless and paralyzed, was able to express his wishes by signs and by sounds bearing some resemblance to speech and was fully capable of making the deed.

There was no proof of undue influence exercised by defendant offered by plaintiff, nor of any fraud or deception. The unequivocal position is taken by plaintiff that the grantor's brain was so affected by his disease that it had ceased to act and he had no mind left and so the deed was a gross fraud.

The defendant shows in detail many acts of the grantor which would indicate that he was possessed of reason and intelligence. These are denied by plaintiff's witnesses. The contradiction here is flat, and I must ascertain where the real truth lies.

The interest of plaintiff, who claims to be a remote relative of Kaanaana, as well as of Namahalaau and Haaheo, who also are said to bear some relationship to him, is manifestly strong against the deed. On the other hand, the interest to sustain it by defendant and her paramour, Kealo, and defendant's brother, Makia, and his wife, Nalilelua, is also strong, and the interest of the lawyer who took Kaanaana's instructions, prepared the deed, and attended to its execution, as well as that of the acknowledging

officer, is also manifest. Where the testimony on one side is so utterly opposed to that on the other, I am obliged to analyze it somewhat. The defendant's witnesses say that Kaanaana heard the news recited, that his house at Waianae had been broken open, and he immediately indicated by gestures and sounds to defendant and others in attendance on him, that he had some money on the plate of the house over the door of the inner room, and that a messenger went after it and brought it to him, and he gave it to defendant to be used for tea and food for a small boy that was being brought up in the house; also that in a similar way he sent to Waianae for some tobacco which he wished, and that he was accustomed during all his illness to smoke a pipe when filled and lighted and handed to him.

The strange statement is made by Mr. Waiamau that he even smoked a few whiffs of a pipe put in his mouth a few hours after the stroke of apoplexy. The witnesses also say that Kaanaana communicated to Kealo and others that he wished the fence around his premises to be repaired, and directed how it should be done; also that he would point to the water bottle when he was thirsty, and would drink when it was handed to him; also that he sent for tea on one occasion.

In fact, if the witnesses for the defense are to be believed, he showed during his illness intelligence and mental capacity.

The circumstances of the execution of the deed in question are fully described. On several occasions Kaanaana urged the defendant, who was his deceased wife's younger sister, and who had lived in his family for over sixteen years, to procure some one to make a paper disposing of his property, and it was finally accomplished by A. Kaoliko above referred to. The force of the testimony of Naai, one of plaintiff's witnesses, is much shaken by the fact that she went with defendant, her husband Kaaua accompanying them, to Mr. Dimond to procure a loan of \$500 on the land in question, about the time of Kaanaana's death.

Mr. Dimond says he relied upon the representation made by Naai and Kaaua that though Kaanaana was paralyzed and speechless, he could express his wishes intelligently. It is impossible to reconcile the complicity of these witnesses, in procuring the loan on the strength of the deed in question, with their testimony that Kaanaana had no mental capacity when he signed it.

On a review of all the evidence I am of the opinion that the proofs on the part of the plaintiff have failed, and accordingly dismiss the bill.

Honolulu, July 8, 1886.

JAMES R. HOLT vs. JOHN BRODIE.

**EXCEPTIONS TO REFUSAL OF THE CHIEF JUSTICE TO GRANT A
NEW TRIAL.**

OCTOBER TERM, 1886.

JUDD, C. J.; McCULLY AND PRESTON, JJ.

After a verdict for plaintiff, a servant of plaintiff provided a lunch for some of the jurors who rendered the verdict, but plaintiff was not a party to it: held, no reason for granting a new trial.

Exceptions overruled.

OPINION OF THE COURT, BY PRESTON, J.

This is an action of replevin, and was tried at the last July Term before the Chief Justice and a mixed jury when a verdict was found for the plaintiff.

The defendant at the same time moved for a new trial on the ground:

"That plaintiff attempted to exercise and did exercise an improper influence over the jury in the said trial, as was shown by his brother, William Holt, (who was also a witness on said trial) treating them to a dinner at the close of said trial."

Supposing the facts alleged in the motion were true, they do not, in our opinion, disclose any ground for setting aside the verdict, and the motion might have been refused on that ground alone.

But affidavits were filed by both parties the effect of which is stated by the Chief Justice in his opinion as follows:

"I find that when the Holt and Brodie case was concluded, one

Bill Perry, a 'cowboy' of Holt's, who had been a witness in his case, applied to his employer just after the verdict was rendered for some money to buy fish for a dinner and for liquor for himself and other witnesses, who were then staying at William Holt's, plaintiff's brother. Money was given to buy fish, and gin was provided.

One of the jurymen (J. Kapou) standing about the Court House, said he was hungry, and Perry invited him and several other jurors (two of whom had heard the case) to come along with him and get something to eat.

They went to William Holt's house and there had a dinner of fish, pol and gin."

The Chief Justice found, and we agree with him, that the affidavits fail to disclose any thing to connect the successful plaintiff with this entertainment. The motion for a new trial was denied and exception was taken to such denial.

The exceptions were argued at this present term by W. A. Whiting for the defendant and W. A. Kinney for the plaintiff.

On behalf of the defendant it was argued that there was such misconduct on the part of the jury as to produce the presumption that some of the jurors had been unduly and improperly influenced, and that it might be fairly inferred the jury had been tampered with and that the defendant did not have an impartial jury nor an impartial trial.

BY THE COURT.

The presumption of honesty and impartiality in the discharge of public duties is so strong that it must be disproved by countervailing evidence, and the contrary cannot be inferred.

If it had been proved that the plaintiff, or any one to his knowledge, or with his sanction, had entertained these jurors before verdict rendered, a new trial would have been granted. Even had this entertainment been given by the plaintiff, although such a practice should be discouraged, we do not think a new trial should be granted. It is clear that he was not a party to it, and cannot be deprived of the benefit of the verdict in his favor.

We know of no case where a similar point had arisen except *Harrison vs. Rowan*, 4 Wash. C. C. 32, where a successful plaintiff

provided a breakfast for the jury after verdict, and for which a new trial was refused.

The exceptions are therefore overruled with costs.

Kinney & Peterson, for plaintiff.

W. A. Whiting & A. C. Smith, for defendant.

Honolulu, October 25, 1886.

ANTONE de FRAG vs. MARY ADAMS, Executrix.

APPEAL FROM POLICE JUSTICE OF HONOLULU.

OCTOBER TERM, 1886.

JUDD, C. J.; McCULLY and PRESTON, JJ.

Under the the Garnishee Act, Compiled Laws, pp. 279, 280, a petition to any Court to issue a garnishee summons must be in writing and contain a specific request for garnishee process. *McCully J., dissenting* on this point.

The common law rule as to an Executor *de son tort* does not apply here. A widow held not to be liable on a note made by the husband, the creditor having failed to comply with the statutory requirements as to claims against estates of deceased persons.

Judgment of Police Court affirmed.

OPINION OF THE COURT, BY JUDD, C. J.

THE plaintiff appealed, on points of law, from a judgment of the Police Justice of Honolulu, sustaining a demurrer to the complaint.

The plaintiff presented to the Police Justice a written complaint in assumpsit on a promissory note of Wm. Adams, containing a prayer for judgment, but not containing a request to the Court to insert in the process a direction to the officer to leave a copy of the process with the garnishee and to summon him to appear and disclose on oath whether he had property of the defendant in his hands or was indebted to her, etc.

This is required by Sec. 1 of the Act to consolidate and amend

the law relating to the garnishee process. Compiled Laws, pp. 279 and 280.

But the Police Justice issued the writ in the ordinary form and the garnishee appeared.

The first question raised is whether the complaint is sufficient to warrant the issuing of the process. We think not.

The argument is made that as the law, Sec. 921 of the Civil Code, allows the District Justice "to cite parties by oral message or in writing," and these justices are not confined to forms, the garnishee process from a District Court need not be in writing and *a fortiori* the request for such process need not be in writing. But Police Courts cannot cite by oral message; they are required to issue summons.

See Sec. 894 and 895, Civil Code.

And we are of the opinion that the Garnishee Act requires a written petition when the power of any Court is invoked to issue the garnishee process. Sec. 13 of the Garnishee Act prescribes that "the provisions of this Act and the powers conferred therein shall extend to all the Common Law Courts of this Kingdom, according to their jurisdiction as at present or in future arranged."

This Act gives a special remedy to suitors, and this Sec. 13, being subsequently enacted to the general law defining the duties of the District and Police Courts, imposes, we consider, a limitation upon them in this respect.

Whatever Court may be invoked to issue this peculiar statutory process, be the same a Court of record or a Court not of record, the request must be made in the method indicated in the Act itself, that is, by inserting in the petition for process a request that a summons to the garnishee may issue.

In the Court's notes of record the petition for process need not be separately made, but it may be incorporated in the statement of claim in the body of the summons, as is now the usual practice we believe. We are strengthened in our view by Sec. 14 of the Act which requires that Sec. 11 shall be printed or written conspicuously on every summons issuing out of any Court of this Kingdom which may be intended to be served on any alleged attorney, factor, trustee or debtor of a defendant in any suit. In the case

at bar the plaintiff filed a written petition and the summons required the defendant to answer the demand of plaintiff "as per declaration attached hereto and made a part hereof."

This declaration, as we have seen, contained no prayer for process against the garnishee, and such process should not have issued.

The next question is whether our law recognizes the principle that a person intermeddling with the estate of a deceased is responsible for the debts as an executor *de son tort*. There is nothing in the complaint to show that defendant, Mary Adams, acted as executrix in her own wrong, and the note which is sued upon was executed by William Adams, deceased. The laws of this country protect an administrator or executor from suit until certain formalities are complied with, which are, substantially, that the claim must be presented to the administrator for allowance before the six months' notice to creditors has expired, and suit must be brought on the claim within two months after rejection. Compliance with these requirements must appear in the complaint.

But counsel for plaintiff say that as these conditions do not exist in this case, they could not be alleged, and that for the protection of creditors the Court should hold that a person intermeddling with an estate should be liable to creditors.

The statutes of this country allow a creditor of a deceased person to apply for administration.

The creditor has it always in his power, by this method, to protect himself, and to obtain possession of the assets and to prevent any improper meddling with or wasting of the estate, and it seems to us that with this simple remedy accessible to the creditor, it would be unwise to adopt the rule of the common law, that the act of a person in taking possession of assets and paying or releasing debts, etc., of a deceased's estate would render him liable as executor *de son tort*.

Other points raised we consider unnecessary to decide.

The judgment of the Police Court is sustained with costs.

J. A. Magoon, for plaintiff.

W. Austin Whiting, for defendant.

Honolulu, October 28, 1886.

PARTIALLY-DISSENTING OPINION OF MR. JUSTICE MCCULLY.

I agree with the conclusion of the Court, and with its views respecting the adoption of the doctrine of executor *de son tort*, but I must very respectfully express my dissent from the view that there must be a written petition to a Police or District Justice before a garnishee summons can be issued.

The garnishee statute provides, in the first Section of it, that when debts are due from any person to a debtor, any creditor may bring his action against such debtor, "and in his petition for process may request the Court to insert therein" a citation to the garnishee. Section 13 extends the provisions and powers of the Act to all the Common Law Courts of the Kingdom according to their jurisdiction.

Police Justices, when applied to, and tendered the costs of process, issue summons to civil defendants within their jurisdiction. Sec. 894. It has always been understood, and rightly I think, that the application may be oral, and it generally is so. An attorney or party taking out a summons is expected to fill out his own summons if the case requires particular statement. The Justice signs and issues it. The observations and the argument respecting the difference between the authority of a District Justice who may "cite parties by oral message or in writing," (Sec. 921), and of a Police Justice who "issues summons," *i. e.*, printed or printed citations only, do not appear to me to be relevant, for, so far as the provisions of the Code are concerned, they make a distinction only in the method of the summons and not of the application for summons which is not required to be other than oral in either case.

The provisions of Sec. 897 emphasize the construction that Sec. 894, above cited, does not require a written petition. Sec. 897 provides that when the plaintiff claims that the debt is fraudulent or that payment is being fraudulently evaded, he may make a sworn complaint in writing, and thus obtain a summons with attachment; and we shall find that wherever it is necessary to present a written petition for a summons, it is expressly so provided in the statute, and also that oath must be made thereto, and this written and sworn complaint becomes a part of the summons, being annexed to it, and being thereafter subject to all the rules of

pleading; see Sections 1099, 1101, 1102, 1116, 1117, 1118, 1119, 1120.

In my view the phrase, "and in his petition for process", should not be construed as amending or modifying the provisions for obtaining a process with garnishee summons from a Police or District Court. The powers of this Act are granted to these Courts "according to their jurisdiction." The word "jurisdiction," I think applies to the authority for issuing a summons on oral application. "His petition" may mean his oral petition, or application. If it had been intended to prescribe a written petition in Courts where it had not been required in similar cases, I think it should and would have been explicitly so expressed, and not left to depend on this slight collateral expression.

Honolulu, October 29, 1886.

APPENDIX.

*In the matter of J. KAKINA, District Judge of Hanalei, Kauai.

COMPLAINT FOR MALFEASANCE.

MARCH 1878.

HARRIS, C. J.; JUDD and McCULLY, JJ.

Alleged malfeasance of a District Judge, in a case between Master and Servant, considered, and the complaint dismissed.

Errors of judgment are not matters which should be held as good cause for removal of a magistrate; but a continued career of gross judicial mistakes might establish the fact of his unfitness for the position and be good cause for removing him.

The Statute of 1866 provides that any District Justice against whom a complaint may be made by the Attorney-General or a Governor, may, for a good cause shown, be removed from office. These proceedings are in the nature of an impeachment of a judicial officer and a judgment against him would revoke his commission. Upon what grounds should such proceedings be sustained? The respondent as a judicial officer is empowered to decide the cases that come before him according to his judgment of the facts and the law, and these decisions, if erroneous, can be corrected upon appeal. But errors of judgment are not matters which should be held as good cause for removal, for no man is infallible. The statute does not mean that the tenure of office of the District Justices should be dependent upon whether they shall always form opinions and render judgments which this Court would sustain.

A continued career of gross judicial mistakes might establish the fact of a Magistrate's unfitness for the position and be good

*Not hitherto reported.

cause for removing him, although such incompetency for office is intended to be corrected by the term of office being but for two years. In this complaint, Mr. John Ross, a master employing contract laborers on Kauai, complains of the refusal of the magistrate to amend a warrant which had been issued and served upon one of his laborers for deserting his service (haalele hana). The magistrate was proceeding to try the laborer on that charge when he was requested to amend it to a charge of refusing to obey an order or of being "nuha" (or stubborn) as the Hawaiians express it. Now an amendment of a process if allowable at all is allowed in the discretion of the Court. In this case the magistrate doubted the legality of the amendment, and tried the case as first presented and gave judgment against the laborer, that is, he gave the master substantially what he required, the judgment of his Court enforcing the contract. It seems to us that the magistrate did not intend to decide that refusing to obey the lawful commands of the master, according to the terms of the contract, was not punishable, but that *stubbornness* was not. Mr. Ross, however, understood him differently. We fail to see in this any ground of impeachment.

In the next instance it appears that another laborer resorted to the magistrate complaining of an assault and battery by Mr. Ross and showing a recent wound on his face. On this Ross was cited by the magistrate to show cause why the laborer should not be discharged from his obligations of service on account of the alleged misuse of his employer.

For the convenience of the master the trial was set two days subsequently, which resulted in a judgment sustaining the complaint and dissolving the contract. It is not made a ground of impeachment that this judgment was erroneous and not sustained by the facts presented to the magistrate. The master thereupon took an appeal and asked of the magistrate a warrant to arrest the servant for deserting his service during the two days that intervened between the assault and the trial. This warrant the magistrate refused to issue, judging that the time necessarily taken in a resort to the Courts of the country (lengthened at the request of the master) to obtain justice in a matter which the magistrate had just decided to be a substantial ground of complaint was not a

willful desertion of his master's labor; and considering that as the Court had dissolved the contract to labor, it would not be just to compel a man to continue the same labor under a judicial sentence by reason of any appeal. We consider the action of the magistrate, in this particular, just and proper, and that no other course could have been approved. It appears that the master asked the magistrate to order the laborer to give security that he would appear at the appellate Court and return to his employment if the judgment should be reversed, or, failing that, he be ordered to remain in his service until the appeal should be heard. The magistrate finding no statute authorizing this, declined to make such an order.

No Court ought to give an order of which he would be unable to compel the enforcement. If he had given the order that such a bond should be given and the laborer be unable or unwilling to give it, what could the magistrate do with him in such case? Certainly not send him back to the very service from the obligations of which he had absolved the laborer.

We have thus examined and passed on each of the several points in this complaint and have found in none of them any good ground or any ground at all for revoking the commission of this magistrate. With the information before us it appears that his course was legal and not injudicious. This involves no opinion of ours as to the propriety of the finding that the assault was a good cause for abrogating the contract, for the facts in the case are not before us and, as we have remarked, that judgment is not laid as malfeasance. The masters and servants statutes are of great service to the industries of the country but it must ever be borne in mind that they are not intended to be an instrument of hardship or oppression.

The law gives the master its aid by penal enforcements, in support of a contract to do certain labor for a stated term. It compels the laborer to serve substantially as he has legally contracted to serve, but it cannot be understood that the law is to be invoked upon every occasion when in the master's opinion the servant has fallen short of the requirements of a good servant; if he has been not prompt in obedience, or has been disrespectful, or slothful, or tardy at his work. The desertion of service contemplated by

statute is a willful desertion, that is, a desertion with intention to desert. Not every absence from labor comes within this description. The *quo animo* is an element in the case to be shown by circumstances and to be considered in a question of desertion, and likewise the refusal to obey must appear to be a willful determination to violate the terms and conditions of service.

Thus while the law will substantially enforce the contract, on both parts, it is not to be invoked to maintain the special discipline which any master may wish to have observed on his place. It cannot be expected to make good servants out of poor material. If the master have contracted with men who are averse to labor, he must depend on his own skill in the management of men to make them good servants.

The information is dismissed.

Honolulu, March 21, 1878.

*G. T. HARKNESS, Master of American Bark "H. N. Carlton,"
vs. ASWAN & CO.

ADMIRALTY APPEAL.

MARCH, 1878.

HARRIS, C. J.; JUDD and McCULLY JJ.

A ship, being chartered for a specific sum for the voyage, was wrecked near port of destination: cargo was lost, but passengers were saved: carrying of passengers was the main object of the charter:

Held, that in Admiralty the charter-money could be apportioned *pro rata itineris*, by deducting from the full sum stipulated a reasonable amount for cargo not delivered, and for expenses in bringing passengers to port of destination.

OPINION OF THE COURT, BY JUDD J.

THIS is a libel *in personam* to recover the sum of \$9,000, the

*Not previously reported.

amount of a charter-party of the American Bark "H. N. Carlton," of which vessel the respondents were charterers for a voyage from Hongkong, China, to Honolulu. The vessel was stranded on the Island of Molokai, on the night of the 28th of January, and became a wreck. The passengers were all saved and brought to Honolulu, but the cargo was lost. The respondents claim that as the ship was chartered for a specific sum for the voyage, the failure to deliver the cargo has defeated the claim for the charter-money.

BY THE COURT.

It has often been held, both in England and in the United States, that when a ship is chartered for a specific sum for the voyage and a part of the cargo only is delivered, the rest being lost by a peril of sea, in an action of covenant on the charter-party there can be no apportionment of freight.

We are of the opinion that in Admiralty recovery can be had according to the benefit received, in case of a partial fulfillment of the contract. The later authorities establish the view that where there has been a partial execution of the contract, the charter-money can be apportioned upon an implied promise to pay "*pro rata itineris peracti*." The charter of this vessel is one for both passengers and cargo, and the fact that the master of the vessel guarantees to carry 350 Chinese passengers in his vessel of 872 tons burden, and did actually transport 369 such passengers, makes it clear that the carrying of passengers was the main object of the charter. But as the condition of payment was the delivery at Honolulu of both cargo and passengers, and as the cargo has not been delivered, the libellant is not entitled to the full sum stipulated for.

It is said, that the common law favors the unity and entirety of contracts.

But as Ware, J., says in *The Erie*, 3 Ware, 229, "The maritime law easily renders contracts divisible, when the justice and equity of a case require it."

The justice and equity of this case, as it seems to us, requires that we should treat this contract as divisible, and we do so by deducting from the full sum stipulated a reasonable amount for

the cargo not delivered, and for the expenses in bringing the passengers from the place of wreck at Molokai to Honolulu.

We find that for 200 tons of cargo, such as chairs and light packages, a freight of \$2.50 is reasonable—as it is in proof that where a vessel is seeking cargo (as this one was,) at Hongkong, freight of this character is carried for almost a nominal sum, and often for \$2.50 a ton. We also find that there were 170 tons of bricks laden on board, some whole and some broken and chipped. We do not consider good the position of libellant, that nothing should be allowed for this, because by the custom of Hongkong the charterers were to find ballast, for the charter contains no such stipulation, and the libellant agreed to furnish his ship equipped for the voyage. But the Court is furnished with no evidence upon which to base an allowance for this portion of the cargo, and we do not undertake to conjecture what sum might be a reasonable freight on it. We are therefore obliged to allow nothing for the bricks.

As to firewood, we think that the excess over what was not consumed by the passengers, say 100 cords, ought to be treated as cargo, but in default of any testimony to guide us in determining what would be a reasonable freight upon it, we are forced to allow nothing.

We find that there should also be deducted the sum paid the schooner "Kinau," for transporting 107 passengers from Molokai to Honolulu, at the rate of \$3 per man: also that the same rate should be allowed respondents for 94 passengers brought down on the "Nettie Merrill." The remainder of the men were brought down by the U. S. S. "Pensacola," for which no charge was made. It was the duty of the libellant to provide transportation for the passengers to Honolulu, if possible. But it seems that 94 men came down in the "Nettie Merrill" no bargain having been made.

On the claim being presented to the respondents they should have referred it to the libellant for adjustment. The impression left upon the Court is that, though the "Nettie Merrill's" bill is for \$500, the respondents will be holden to her for only as much as we adjudicate to be reasonable. We also allow \$100 to respondents, the price at which the cargo sold at auction at the instance of the libellant.

SUMMARY.

Allow for 200 tons light cargo at \$2.50.....	\$ 500
“ “ passage of 107 men per Kinau” at \$3	321
“ “ “ 94 “ “ Nettie Merrill” at 3.....	282
“ “ proceeds of cargo.....	100
	<hr/>
	\$1,208

which sum deducted from \$9,000, the amount of the charter, leaves \$7,797, for which sum judgment may be entered, as well as for costs of this appeal. Costs of first trial as allowed by Mr. Justice McCully.

T. C. MacDowell for libellant.

E. Preston and *C. Brown* for respondents.

Honolulu, March 19, 1878.

*KAOPUA (k.), KALAMA (w.), and EKEKELA (w.), vs. RUTH KEELIKOLANI.

APPEAL FROM DECISION OF JUDD, J.

JULY TERM, 1875.

ALLEN, C. J.; HARRIS and JUDD, JJ.

In an action for cancellation of a power of attorney, and conveyances under it, on the ground of fraud practiced by the donee of the power upon the donors:

Held, that the donors had full opportunity of ascertaining the contents of the power: they acknowledged the same before the Registrar of Conveyances: a year afterwards they drew an order on the donee for proceeds in his hands: seven years elapsed before they brought the matter into Court: and they must now abide by the contract which was made for them by their authority.

A Court cannot go on concluding that people do not understand the consequences of their own acts, and relieving them against the

*Not hitherto reported.

consequences of their own ignorance and stupidity, more especially when, as in this case, they would be obliged by doing so to inflict a wrong on third parties.

Decree set aside, and bill dismissed: JUDD, J., dissenting.

OPINION OF THE COURT, BY HARRIS, J.

By the bill it is alleged that the plaintiffs jointly with one Ma-huia are heirs at law of Kaleiheana (k) who at the time of his decease was seized and possessed of a land called Helumoa, and was tenant in common with Her late Royal Highness Victoria Kamamalu, of lands known as Kanewai, Kanewai Kahala, and Pahoa, situated at Waikiki, Oahu, near the city of Honolulu, and the defendant in this suit is the heir, by several descents, of the aforesaid Princess Kamamalu.

It appears by the testimony of Mr. Mahelona that, for some reason or other, the late Hon. John II and His Highness M. Kekuanaoa, guardians of the Princess Kamamalu, claimed the whole of the lands in question, and in 1859 Mr II drove the heirs of Kaleiheana from the land of Kanewai and kept possession of it for his ward, and shortly thereafter, in 1859, Kaleiheana's heirs commenced an action of ejectment in the Supreme Court, but were not successful. A reference to the record of the Court in that case shows that they were non-suited three times, and withdrew once, and being undismayed, on the arrival of William Claude Jones, Esq., in this country, they employed him, and prepared to commence anew their action in 1867, seven or eight years after the first proceedings were commenced.

They paid Mr. Jones a fee of \$50, and Mr. Jones drew up a bill of complaint which he submitted to Mr. A. J. Lawrence, then recently arrived in this country, and who had been engaged by Mr. Jones to assist him in the matter. The bill goes on to allege that Lawrence, after being engaged by Mr. Jones, falsely represented to the plaintiffs that Mr. Jones was in the interest of their adversaries and desired them to employ him (Lawrence.) By the bill, however, it does not appear that they took Lawrence at his word, but went to Mr. Jones, who told them that they must give him a share of their lands, or he would no longer act for them, and thereupon they paid Lawrence a fee of \$80, and employed him,

being, as they say in their bill, importuned thereto by Lawrence.

The bill goes on to allege that Lawrence caused a power of attorney to be drawn up in the English language as follows :

“ Know all men by these presents, that we, Kalama, Kuopua and Nahua, of Honolulu, Oahu, Hawaiian Islands, heirs of Kalei-heana, deceased, have constituted and appointed and by these presents do constitute and appoint Andrew J. Lawrence, of Honolulu, Oahu, Hawaiian Islands, our true and lawful attorney in fact for us, and in our names to sue for, recover, take possession of, compromise, dispose of, or sell and convey all our rights, titles, and interests in the lands of Kanewai, Kanewai Kahala, Pahoa and Helumoa ; and our said attorney is authorized to sell and convey by way of compromise, or otherwise, all or any portion of our rights, titles and interests in any or all of said lands, at such prices, and on such terms as he may think best ; to receive and receipt for all sums of money received for the same, and for and in our names to make such deeds of conveyance to the purchaser or purchasers thereof, as may be necessary and proper to convey our interests therein, and to do all and every act which may be necessary to carry into effect the powers and authority herein granted to him. And we hereby promise and agree to ratify all the acts of our said attorney done in the premises. And we hereby revoke all powers and authority heretofore given to any other person or persons to act for us in relation to the lands aforesaid ; and the power and authority hereby given to our said attorney is irrevocable by us until the objects for which it is given shall have been accomplished by him.

In witness whereof, we have hereunto set our hands and seals this 20th day of December, 1867.

KALAMA, [L. S.]

KAOPUA, [L. S.]

NAHUA. [L. S.]

Signed sealed and delivered in the presence of

W. P. RAGSDALE.

JAMES D. HALAI.

I certify that I have this 20th day of December, 1867, read, translated and interpreted the foregoing power of attorney to Ka-

lama, Kaopua and Nahua, the persons who executed the same.

WILLIAM P. RAGSDALE.

Interpreter and Government Translator.

REGISTER OFFICE, OAHU, SS.

On this 20th day of December, A. D. 1867, personally appeared before me Kaopua and his wife Kalama and Nahua, parties to the foregoing instrument, who severally acknowledged that they had executed the same for the uses and purposes therein set forth; and the said Kalama, on a private examination separate and apart from her husband, declared that she had executed the same of her own free will without compulsion, fear or constraint from her said husband.

THOMAS BROWN,

Registrar of Conveyances."

Which they signed, under the impression that it was merely a power to Lawrence to recover their lands in Court. That soon after, J. D. Halai, who as clerk to Lawrence had written out the power of attorney, told them that Lawrence had sold their lands by virtue of the authority of that paper; that they immediately complained to Governor Dominis, one of the administrators of the estate of M. Kekuanaoa, who was heir of his daughter, Princess Kamamalu, and to several others, saying that they had not intended to sell the land, and had never signed the power of attorney with knowledge of its contents; and the bill goes on to aver that as they are informed and believe the said Lawrence was engaged by the administrators of Kekuanaoa's estate to act in the premises against the interest of these plaintiffs and was retained to act in that behalf; and the plaintiffs aver that the conveyance made under and by authority of the said power of attorney is false, fraudulent and void, and pray that said pretended conveyance may be ordered to be delivered up to them to be cancelled.

The answer sets forth in general terms that there was no fraud on the part of the purchasers of this property; that the plaintiffs well knew that Lawrence had authority to sell their lands; that the sum of one thousand dollars was paid for the said lands, viz: \$750 for the lands held jointly with Kamamalu, and \$250 for Helumoa, \$200 being kept back for one of the heirs who had not signed the

power of attorney, making in all \$1,200 for the interest of the heirs of Kaleiheana in the several lands, and that these plaintiffs subsequently signed an order for \$650, to be taken out of the proceeds of the sale of the land in question.

The question in this case is not whether Mr. Lawrence acted with entire good faith towards his clients, but whether the purchasers acted in good faith, or in fraudulent collusion with Lawrence. Hence the allegation that plaintiffs are informed and believe that Lawrence was engaged by the administrator of the Princess Kamamalu's estate (Governor Dominis) to act in the premises against their interest and was *retained* to act in their behalf is most important, for if that averment could be proved, it would make Lawrence the defendant's agent and show that he was acting for both without the knowledge of his professed clients, which would be in fraud of them, and that fraud would necessarily be known, under the circumstances, to those acting for the persons whom this defendant now represents. But there is not only no evidence to show the truth of this allegation, but no attempt is made to show it. And surely it cannot be seriously insisted that any inference can be drawn favorable to the allegation, because Governor Dominis, who was equally available to the plaintiffs, if they had chosen to call him, did not offer himself to disprove an averment, the truth of which no one had attempted to substantiate. He, as well as the defendants' counsel, had a right to suppose that the averment was not eventually relied upon. Therefore Lawrence remains, as regards the transaction, the agent of the plaintiffs alone.

Now it might well be that Mr. Lawrence held out alluring inducements to the plaintiffs to employ him, representing to them the benefits that would result to them from his efforts; and after he had gotten the money for the land, he may have appropriated it to his own use; and yet the defendant would not be accountable in the slightest degree for any of his acts. He came to the defendant or to those in whose place she now stands, with a power of attorney in due form, containing a specific authority to sell these very lands. This instrument was witnessed by two Hawaiians, conversant with both languages, and duly acknowledged before the Registrar of Conveyances. Surely there was no occasion, on

the face of it, for the purchaser to go any further We shall advert to this again.

It is said by counsel for plaintiffs that "the evidence is conclusive of fraud on the part of Lawrence." If it were so, it would not be even indicative of any fraud or act of omission amounting to fraud on the part of the purchasers, and it is on this ground alone that the plaintiffs can succeed. It is asked, "Is it not inconceivable to one familiar with the Hawaiian character, that these people should authorize a newly arrived foreigner to sell out all they had for a fourth of its market value, or still more to sell at his own discretion as to price?" Certainly it is inconceivable that they should authorize a sale at a fourth of the market value, but it is by no means inconceivable that they should employ confidentially a newly arrived foreigner, and even to the extent which this instrument indicates. Indeed it is notorious, that whether as lawyer, physician or clergyman, or in any relation, it makes no difference that any one has served and guarded them faithfully for years; let a stranger put in an appearance and he stands as good and perhaps better chance of employment and confidence.

With regard to the inadequacy of the price, it is to be taken into consideration that they had been warring for seven years, had been non-suited three times, and had discontinued once, had employed again counsel, (Mr. Jones himself, by the way, recently arrived), given him a fee of \$50, and received from him after a time the assurance that he could go no further unless they gave him a share of the land, and were obliged to look out for new counsel to whom they paid \$30; it would not appear anything very strange that they should offer to sell out or compromise for \$1,200, nor very strange if their opponents, under all the circumstances, should think that they were doing a reasonable if not a generous act in acceding to such a compromise; and it is certainly very doubtful whether anybody could have been found in the market to offer so large a sum for a litigated estate, nor must it be forgotten that the \$1,200 is not a quarter of the value of their estate, even on the estimate, but one quarter of the value of the whole estate, to a large portion of which the purchasers had an unquestionable title and the whole of which was in their possession and had been so for a long time.

Much stress has been laid upon the fact that Halai, who was a native Hawaiian, wrote the instrument in English. But he was a mere copyer, or clerk, and copied the paper, probably, as it was given to him. There is no evidence given of the amount of education of these plaintiffs, but judging from their signatures affixed to the document, it would make but little difference to them whether it was written in English or Hawaiian, since in either case some one else must read and interpret it to them. Again, it is said that it required no power of attorney between the parties to sell when they were so near to each other; surely it needed no power of attorney to carry on the suit, and needed none to negotiate; and therefore the purchasers might reasonably suppose that it was given for something; and if for anything, for what purpose other than that for which it purported to be?

But it is said that the power of attorney contains a clause whereby the plaintiffs "promise and agree to ratify" the acts of their attorney; "but no application for such ratification appears to have been made to them by the purchaser." It would scarcely appear necessary to comment on that point. If they have "promised and agreed to ratify," it is for the Court to hold them to their promise and agreement. The words are no different in effect than if they had used the words "hereby ratifying and confirming."

But it is said the power of attorney to sell was not knowingly executed, and is void, and gave Lawrence no power to sell. And counsel in their brief go on to say "it was not a voidable contract obtained by fraud or misrepresentation, but no contract at all, and gives no basis of a title more than a forged deed." If this last position be true, then plaintiffs have no status in this Court; for it does not require a proceeding of this nature to set aside a forged deed; and the whole of this proceeding is grounded on the assumption that the power of attorney was obtained by fraud and misrepresentation. But if it be granted that plaintiffs did not know what they were signing, it would be an exceedingly strange and dangerous idea that one could sign an instrument by which another is enabled to obtain a large sum of money from a third party, and then, seven years after the act, be enabled to avoid the

effects of his act after the money has been misappropriated by their own agent and without even the pretence of an offer to restore the money and put the purchasers in the position they were in before the act. Such a holding would be to treat Lawrence as the agent of the purchasers and not as the agent for these plaintiffs.

Nor is it clear that they did not know that the instrument was an authority to sell their lands, or, in other words, to compromise their suit. Mr. Mahelona says that he heard Ragsdale say that it was an authority to Lawrence to act for them, to attend to their lands for them, to talk with the Chief about the land, and if the Chief should wish to lease or buy the lands, that he would come and consult with them: that Lawrence talked some Hawaiian himself, and said the same thing, and that he himself (the witness) told them that if Lawrence could get \$8,000 or \$7,000 for their land they had better sell.

Then if this be true, they were talking at the time of selling the lands, and Mr. Mahelona raised extravagant hopes in their minds about it. Surely the purchasers are not responsible if the plaintiffs' agent did not communicate to them the offer he had received or consult with them regarding the price before closing with the offer.

Again, Ragsdale swears that he did interpret the instrument to them, and read it to them so as to impart the same impression that he himself received from the paper: that money was mentioned, he thinks \$1,600. The parties, (says this witness) most undoubtedly understood thoroughly that the document gave Lawrence the authority to lease, sell or compromise the land. They understood it, for that was the gist of the whole matter. I explained to them the most important parts of the document.

This is the evidence of their chosen interpreter and witness to the instrument, and if it is to be relied upon, shows not only that they understood the paper, but that the sum of money which they might hope for was being talked of; and the witness adds "the parties were apparently exhausted by long litigation and had not been treated well by the persons employed by them." It certainly can be of no consequence that when written to at a distance with no papers before him, this witness, after a lapse of seven years,

replied that the paper was a deed and the sum of money \$800; for any one may have a wrong impression at that distance of time regarding a paper which is not before him, that was of no personal importance to himself, and which is only among many hundreds that passed before him in the way of business: but when the paper is put before him on the stand, and he has had the opportunity to think and refresh his memory, this is his testimony.

This paper, therefore, is produced to the purchaser, drawn up and executed in due form of law, and witnessed to have been so executed by two competent interpreters, one of whom was a professed interpreter; and acknowledged before the lawful officer to take such acknowledgments, and in addition certified by a competent interpreter to have been fully translated to the persons executing it. Surely the most cautious and prudent lawyer or counsel need go no farther.

Mr. Jones had no apprehensions excited in his mind: and if not Mr. Jones, why Mr. Stanley or Governor Dominis? Mr. Jones in the course of the hearing said that he took no care or notice of it, because he had been excluded from the case—supplanted by Mr. Lawrence. Surely Mr. Jones does himself injustice. He, as counsel in the case, would scarcely have allowed the averment to go into the bill, that he refused to go on with the case unless they gave him a share of the land—if the truth was that instead of his leaving the case, his clients withdrew the case from him. And he can, still less, mean to say that after having received \$50 as a fee from these people, and left them because they would not give him an interest in the land, he saw a fraud about to be perpetrated upon them without taking sufficient interest in them to warn them. The better inference, and the one probably most consonant with the truth, is that Mr. Jones saw no wrong, suspected no wrong, and if he saw and suspected no wrong, then there was no reason why the purchasers or their attorneys should see or suspect any wrong.

Counsel urge that defendant's ancestors were not *bona fide* purchasers since they neglected to take reasonable precautions to see if the heirs of Kaleiheana had agreed to sell * * *. "The purchasers, acting under the advice of an eminent conveyancer, would not have omitted to ask for the original deeds to accompany

their purchase, if he thought it of any use to ask them. These latter deeds are now in the plaintiffs' possession."

To the first part of this it is proper to answer that the power of attorney itself sets forth a desire to sell, and one is fairly to be presumed to desire that which he deliberately sets forth in a formal document he does desire. And they, the purchasers, might have asked for the original deeds if they thought it of any use so to do, but our registry laws have taken away that importance from the fact of possessing title deeds which was necessarily attached to that fact at times when and in countries where no such laws existed. But in this particular case the only title deeds which the plaintiffs have or can have are certificates of Land Commission awards to their ancestors, taken from the public records, and any one can have a like certificate by paying a very small fee; and further, for those pieces in which the Princess Kamamalu was joint owner under the Land Commission award, her guardians and representatives undoubtedly had a like certificate, and could obtain as many as they might choose to pay for; so that truly it might be said it was of no use to ask for them, and the present possession of them by the plaintiffs can be of no inconvenience to defendant, and can afford not the smallest presumption that the power of attorney to Lawrence, by authority of which he conveyed the estates, was not signed by them for the uses and purposes in it set forth.

It further appears that the power of attorney in question was made on the 20th of December, 1867, and the purchase was not completed until fully three months afterwards, a circumstance of not much importance, but tending surely to show that there was no such haste as would tend to show an undue anxiety on the part of the purchasers; such as would accompany a consciousness of a fraudulent collusion or a collusion of any kind with the attorney in fact for the other side. Very nearly a year afterward, all the heirs of Kaleiheana, represented here, signed an order for \$650 on Mr. Lawrence, to be paid out of the proceeds of sale of Helumoa and Kanewai, on which Mr. Lawrence wrote an acceptance to the effect that he had \$500 belonging to them, which he would pay over on their giving him a receipt in full of all demands. From this it would appear that \$500 of the money was already used up

or appropriated by Mr. Lawrence, and it is suggested that they signed this without a clear understanding of its import, and did not intend by this to ratify or acquiesce in Mr. Lawrence's sale. Mr. Widemann says that he interpreted it to them, and thinks they understood it, though he took no particular pains to make them understand it. But a Court cannot go on concluding that people do not understand the consequences of their own acts, and relieving them against the consequences of their own ignorance and stupidity, more especially when, as in this case, they would be obliged by doing so to inflict a wrong on third parties. If Mr. Lawrence "made use of his confidential relations with them to get a power of attorney, utterly unjust and inequitable, which would enable him to sell their land for any sum however inadequate," it should be remembered that Mr. Lawrence had no confidential relations whatsoever with the party defendant or her ancestors, and the power of attorney which these plaintiffs voluntarily signed, without any solicitation on the part of the purchasers, enabled their attorney to obtain one thousand dollars for the conveyance of their interests in the lands. By their power of attorney they held Lawrence out as a person in whom they had confidence; they had an opportunity of ascertaining most fully the contents of the paper when the interpreter, Ragsdale, was called in, and apparently, as far as one can judge by testimony, availed themselves of it. They might have availed themselves of the services of any other person to tell them what it was; and finally they acknowledged before the Registrar of Deeds that they signed it "for the uses and purposes therein set forth," which they knew or ought to have known to be a solemn and binding act required by law. They had then another opportunity to enquire into the contents of the paper, and after that there were three months during which they could have enquired, and if the instrument was not what they intended, have had the matter rectified. A year after they drew an order for some of the money. Seven years elapsed before they undertook again to question this matter in Court, and they must now abide by the contract which was made for them by their authority.

DISSENTING OPINION OF JUDD, J.

I have not changed my opinion in regard to this case, as given in my judgment, rendered February 26, 1875, from which this appeal was taken. I therefore respectfully dissent from the above judgment.

A. S. Hartwell and *W. C. Jones*, for plaintiffs.

R. H. Stanley, for defendant.

Honolulu, August 28, 1875.

DECISION OF JUDD, J., APPEALED FROM.

The bill was filed September 16th, 1874. Defendant demurred for non-joinder of parties, September 23d; demurrer was sustained and the bill amended by adding Ekekela as party plaintiff. Answer was filed November 17th, and case brought on for hearing January 21st, 1875, and proofs closed February 8th. It appears from the pleadings in this cause that Kaopua, Kalama, Ekekela and Mahuia are the heirs-at-law of Kaleiheana, deceased, who was at the time of his death seized and possessed of the land "Helumoa," and that he was a tenant in common with Her late Royal Highness Victoria Kamamalu in the lands of "Kanewai," "Kanewai Kahala," and "Pahoa," all of these lands being situate at Waikiki, Oahu, and also that the defendant is the heir-at-law of His late Highness M. Kekuanaoa, and of His late Majesty Kamehameha V., and that said M. Kekuanaoa was the heir of Her late Highness Victoria Kamamalu.

It also appears from the pleadings that a power of attorney was executed by Kaopua, Kalama and Nahua (now deceased, under whom Ekekela claims) to one A. J. Lawrence, on the 20th of December, 1867, acknowledged before Thomas Brown, Registrar of Conveyances, and by him recorded on the same day; and that under this power, the said Lawrence executed, on the 18th March, 1868, certain deeds of conveyance as follows; of the said land "Helumoa" to His Majesty Kamehameha V., for the consideration of Two Hundred and Fifty Dollars; of the lands of "Kanewai," "Kanewai Kahala" and "Pahoa," to J. O. Dominis, Administrator of the estate of Princess Victoria Kamamalu, for the consideration of Seven Hundred and Fifty Dollars, deeds

recorded respectively on the 8th and 19th of September, 1874, and that said Lawrence signed the names of Kaopua, Kalama and Nahua to these conveyances as their attorney in fact.

The bill alleges that the said power of attorney to Lawrence was written in the English language, of which the orators were ignorant, and that it was represented to them that this power gave said Lawrence, who was an attorney and counsellor at law, authority to recover said lands (which were then in the possession of His late Majesty Kamehameha V.,) by proceedings in Court, and that it was signed by them under that belief, and so far as the said power of attorney purports to authorize the said Lawrence to sell their said lands it is fraudulent and void, as they never gave or intended to give Lawrence any power to sell these lands, and the bill prays for a decree for the delivery and cancellation of said power, and also of the deeds of conveyance executed by said Lawrence. The bill, in short, alleges such misrepresentation as amounts to legal fraud.

The answer alleges that the said power of attorney was truthfully interpreted to said Kaopua, Kalama and Nahua, and that they knowingly signed, executed and acknowledged the same.

The main question at issue is whether this power of attorney was executed by the parties with a full knowledge and understanding of its contents.

The burden of proof is upon the plaintiffs to establish their case: "Fraud will never be presumed, but must be clearly established by proof; *dolum ex indiciis perpicuis probari convenit*. It is not, however, necessary that positive and express proof thereof should be given; for whenever it is manifestly indicated by the circumstances and condition of the parties contracting, it will be presumed to exist." Story, Contracts, §499.

As a Court of Equity, invested with more extensive and unrestricted jurisdiction than Courts of Law in cases of fraud, I now examine the whole transaction to see if fraud can be inferred from the special circumstances of this case.

The plaintiffs have shown energy, determination and persistence in pushing their claims for these lands, really worthy of admiration. The records of this Court show four actions of ejectment brought by them against the late John II, who was guardian

of the late Princess Victoria Kamamalu, to recover possession of these lands. But in three of these cases they were nonsuited and the last case was discontinued on their own motion.

The Princess Victoria having died in 1866, June 29th, they employ Mr. W. C. Jones, an attorney of this Court, who had lately arrived in this Kingdom, and on July 11th, 1866, he procured the allowance of their accounts as administrators of the estate of Kaleiheana, and they were decreed to be his heirs.

Mr. Jones, in 1867, drafted for them a bill for partition of these lands, in which they pray that M. Kekuanaoa, as administrator of the estate of the late Princess, may be made a party defendant. Mr. Jones says that Mr. A. J. Lawrence was associated with him in the case, and that the bill was never filed because Lawrence retained it, and had worked him (Jones) out and himself into the plaintiffs' confidence, but finally Lawrence returned it, saying it was "all right."

Lawrence prepares an exhaustive statement of the claims of these plaintiffs as the heirs of Kaleaheana, and has it presented to the King, Kamehameha V., who was then in possession of these lands; it prayed the King to allow them to take possession of Helumoa and to divide the other lands with them. Next comes the power of attorney to Lawrence, executed December 20th, 1867. On March 17th, 1868, J. O. Dominis, then sole administrator of the estate of Princess Kamamalu, applied for and received permission from the Court to expend \$1200 of the funds of the estate in the purchase of the interests of the heirs of Kaleiheana in these lands.

Lawrence appeared for the heirs of Kaleiheana. The deeds by Lawrence were made the next day, March 18th, 1868.

The property in question is estimated by Dowsett and Pico as worth the sum of \$4,500 to \$4,900, but as the interest claimed by the plaintiffs in all the lands except Helumoa is only a half interest, it would be fair to estimate the value of the plaintiff's interest at from \$2,800 to \$3,000.

The plaintiffs no doubt set a higher value on the property as being the ancestral domain, and on account of the expense which they have incurred in their hitherto unsuccessful litigation for this property.

I refer to the value of the property as compared with the price which Lawrence obtained for it, being only about one-third, not that the bill alleges inadequacy of consideration, but as tending to throw light on the question whether these people could have intended to give full authority to Lawrence to sell their interest in this property without limit as to price for any sum which suited his views, and without any reservation to themselves of the right of ratifying the sale.

It is in testimony that Kaopua is quite hard of hearing; that Nahua was elderly, one of the old-fashioned retiring Hawaiians, and Kalama seems to be possessed of more zeal than intelligence.

Was it likely that they would have given this unconditional power of sale to Lawrence, a comparative stranger to them, if they had fully comprehended its import?

It is alleged in the bill that they did not understand it as meaning what it expresses on its face. The answer alleges that they did so understand it. The testimony of the subscribing witness, Ragsdale, was taken; the other subscribing witness, J. D. Halai, having died since the bill was filed. Ragsdale swears positively, "I read the paper to them so as to impart the same impression to them that I received from the paper myself," and "that they undoubtedly understood thoroughly that the document gave Lawrence the power to lease, sell or compromise the land, because that was the gist of the whole matter."

Such testimony by a subscribing witness is very strong and requires strong proof to gainsay it. Ragsdale's memory is somewhat shaken, in my opinion, by the three letters written by him. Jan. 12th, 1874, he writes to Wm. Austin Mahuia that the paper he witnessed and translated was a *deed*, and the money mentioned was \$800. Sept. 22d, he writes to Mr. Hartwell that the paper was a power of attorney, and that the parties were induced to sign the same because Lawrence said that he could make it profitable for them, and that he could get at least \$1,600 or \$1,800 for the lands. Oct. 1st, he writes to Mr. Stanley, that his memory had been very much assisted by Mr. Stanley's letter, etc., and that he is positive that the parties "knew they were giving Lawrence full power to sell, compromise, lease or otherwise, all their rights and titles to the

properly mentioned in the power of attorney." He adds that something was said by Lawrence before the parties signed the document, of the petition to the King and the Court business. He says also that William Austin was one of the parties to the power of attorney, which is not the case.

In his testimony before the Master he says, that after witnessing the power of attorney "Lawrence suggested that I should add on this certificate." "When they signed the paper I put on the certificate." The witness did not have the original before him when he gave the testimony or he would have seen that the certificate referred to, of his having correctly interpreted the document, was written by Halai, and evidently contemporaneously with the entire instrument.

The loss of Halai's testimony is to be regretted. I regard Ragsdale's testimony as amounting to this: that he was called over to Lawrence's office just before Court time, and interpreted the document in the usual manner, the impression being left on his mind that the parties understood the same.

The power of attorney, though drafted by Halai, a Hawaiian, is in the English language, a circumstance of slight importance perhaps, but it is enough to rebut the presumption that they understood it and creates the necessity of showing knowledge on the part of the plaintiffs of its contents.

The impression left on the mind of a Hawaiian bystander is valuable as showing the impression likely to be left on the plaintiffs' minds.

S. W. Mahelona testifies that he stood at the door of the office and Ragsdale said "this paper is to authorize Lawrence to act for you, to attend to your lands for you, and talk with the Alii about the land; and if the Alii should wish to lease or buy the land that he would come and consult with them. I saw them sign their names. Lawrence talked some in Hawaiian himself, and he said this paper is for me to attend to your land, for me to talk with the Chief, and if he wishes to lease or buy I will come and let you know. After the paper was signed I told them if Lawrence can get six or seven thousand dollars for your land you had better sell."

Mahelona understood that the power of attorney gave Lawrence

the power to negotiate, but that the parties reserved the right to ratify any bargain, and were to be consulted as to the price; and, if these were really the representations made, the contract does not express the true intention of the parties.

H. L. Sheldon testifies that in 1867 he occupied a desk in Lawrence's office, and frequently interpreted between him and these claimants about the lands in question, and after Lawrence had said to him that he was in treaty with the King, through Governor Dominis, for a sale, he told Kalama of this, and she replied that they wanted to get the land back, and would not sell it.

If this conversation took place after the signing of the power of Attorney, it shows what Kalama then understood Lawrence's powers to be; and it is not likely that Lawrence would have commenced negotiations to sell until after he received the power. After Sheldon learned that Lawrence had sold the lands, he told Kaopua and Kalama of it, and that the money, \$1,200, was in the bank for them, and they indignantly declared they would never touch a dollar of it; and as a matter of fact, they have not received any of the money.

Mr. Jones said that when he charged Kaopua and the others with having authorized Lawrence by power of attorney to sell the land, they denied it to him.

Mr. William Austin says that when he (after having refused to sign the power of attorney on Sheldon's request) told these people what they had done, in signing this power of attorney, Kalama said, "Auwe!" (alas) and that they had not signed such a paper, but they gave Lawrence a power of attorney to act as their attorney.

I do not regard the testimony of Registrar Brown who took their acknowledgements as conclusive, for he merely asked them if they had signed the paper, and asked them no question drawing from them their understanding of the paper, nor did he tell them what its contents were.

I am forced to the conclusion that the plaintiffs believed that they were authorizing Lawrence to act for them in recovering the land, and to negotiate a sale which, if the terms were satisfactory, they would assent to.

Why should Lawrence have mentioned any sum of money to them when by the power he was unlimited as to price, unless to

induce them to sign the paper, and without which allurement they would not have signed?

I see no necessity for any power of attorney. The parties were all residents here, well known, easily accessible and not numerous. Their claims to these lands were notorious.

It is urged by the defendants' counsel that the plaintiffs must have known of Lawrence's authority to sell, because there were certain proceedings in the Probate Court, in the estate of Victoria Kamamalu, in which Lawrence appeared as attorney for the heirs of Kaleiheana. I do not regard this as of much force, for no public notice of this hearing was made by advertisement nor were the parties themselves present. Lawrence signed as attorney for the heirs including W. Austin, for whom he had no authority whatever, and though the price agreed upon for the lands was \$1,200, the sum of \$200 was retained on account of W. Austin's not signing the deeds.

It would seem that the notoriety of the former suits against Her Highness Victoria's guardian, and the unusual circumstances of their having constituted an attorney in fact, though residents in this Kingdom, ought to have put the Administrator, or whoever represented the Princess' estate, on their inquiry. It would have been an easy matter to have ascertained from the parties themselves if they were willing to sell at this extremely low price.

The strongest point in the defense is the order put in evidence; it is in these words:

HONOLULU, March 2d, 1869.

HON. A. J. LAWRENCE, Local Circuit Judge, Maui:

Sir: Please pay to Kaualua (w.), or order the sum of Six Hundred and Fifty Dollars out of the proceeds of sale of Helumoa and Kanewai.

\$650.

(Signed,)

{ KAOPUA,
KALAMA,
NAHUA.

ENDORSEMENT.

HONOLULU, April 28th, 1869.

I have Five Hundred Dollars in my hands belonging to these parties who signed the within order, which I am willing to pay

on this order when they will give me a receipt in full of all demands, and accept this order for the above amount subject to the conditions above specified.

(Signed,)

AND. J. LAWRENCE.

It is a well settled principle of law that if a person, with knowledge of the fraud, acquiesce in the contract expressly or do any act importing an intention to stand by it, he cannot afterwards avoid it. Story, Contracts, Sec. 497.

Does this transaction make out a case of acquiescence in the fraud?

The date of the order is March 2d, 1869, more than a year after the power of attorney was given to Lawrence, and undoubtedly after the parties had knowledge of Lawrence's fraud on them, if fraud it was. Mr. Widemann testifies that he wrote this order, acting for Kauaulua, the payee, and interpreted it to the parties, and thinks they understood it, but did not take any particular pains to make them understand it, nor did he tell them they would lose their rights in the lands if they signed the order.

The witness states that these parties had come to his office to pay an amount of money which they owed his principal, Mr. Spencer, and he, ascertaining that they had borrowed the money for the purpose from Kauaulua, got them to sign this order that she might have some security; but it appears that on February 27, 1869, a few days previous, these parties had given a note to Kauaulua for this very amount of \$650, and had executed a mortgage in her favor on the very lands now in question and on some other lands on Hawaii, and their acknowledgments to this mortgage were taken the very day this order was signed.

Though this would be a very strange transaction among intelligent people, yet we must remember the readiness with which old natives sign papers, not clearly understanding their import. It seems to me that they must have confused this order with some of the other transactions that were going on in Mr. Widemann's office at the time, and did not intend by this to ratify or acquiesce in Lawrence's sale, for all their other acts and words clearly show no such intention.

Lawrence's acceptance of the order, being willing to pay the sum of Five Hundred Dollars on condition of the parties giving

him a receipt in full of all demands, shows that he deemed their discharge of some value to himself; but there is no evidence that any effort was made to procure their discharge of Lawrence.

I am aware that great caution should be used by Courts of Equity in exercising the power of ordering solemn instruments affecting real estate to be delivered up for cancellation, and it is a matter of congratulation that the Courts of this Kingdom have only twice in the last ten years exercised this power.

In this case I cannot avoid the conclusion that the power of attorney was obtained by fraud. It must be remembered that Lawrence occupied towards these parties the relation of attorney or solicitor to clients; and equity would interpose to declare transactions between them void which between other persons might be held unobjectionable. 1 Story Eq. Jur. §310. He made use of his confidential relation to secure a power of attorney utterly unjust and inequitable, for it gave him the power to sell their lands for any sum however insignificant and inadequate, and was in its terms "irrevocable until the objects for which it was given shall be accomplished by him."

It would do violence to my sense of justice to allow such a transaction to stand, for if Lawrence had not been inclined to sell, he could hold the real estate tied up by this power so long as he lived and thus deprive these parties of their right of alienation.

A decree will be signed ordering the power of attorney to Lawrence, and his conveyances under it, to be delivered up for cancellation.

Honolulu, February 26, 1875.

*LUKA (k.) vs. POOHINA (k.)

EXCEPTIONS TO RULINGS OF JUDD, J.

OCTOBER TERM, 1876.

HARRIS and JUDD, JJ.

In an action to recover value of necessities supplied to defendant's wife, while she was separated from him on account of his adultery, the Court charged the jury: "that if they found that the defendant's wife separated from him on account of his adultery, the fact of her living in adultery subsequently would be no defense to the action."

Held, that if the adultery of the wife should be notorious, this Court would hereafter instruct the jury that the husband would be free from his liability, but there being no evidence to show notoriety of the wife's adultery, or knowledge of that fact by the plaintiff, the instruction given was proper.

Exceptions overruled.

OPINION OF THE COURT, BY HARRIS, J.

THIS action was brought to recover the value of necessities alleged to have been furnished to defendant's wife whilst she was living apart from the defendant, her husband. It was made to appear at the trial, that the defendant's wife had separated from him on account of his adultery, he taking his paramour into his own house; and the defendant's counsel claimed to have put before the jury some evidence tending to show that after the separation, the wife had likewise committed adultery, and asked the Court to instruct the jury:

"That if they found that defendant's wife was justified in separating from her husband, but that she had since committed adultery, they will find for the defendant:" which instruction was refused, but the Court did instruct the jury, "that if they found that the defendant's wife separated from him on account of

*Not hitherto reported: see 8 Hawn., 728.

his adultery, the fact of her living in adultery subsequently would be no defense to the action."

If a man, without any justifiable cause, turn his wife out of doors, he is liable for any contracts which she may make for necessities suitable to her degree and condition. So likewise, if by his own misconduct, he makes it impossible or improper that she should continue to dwell with him. And the question is when he will be discharged of that liability by reason of the wife's misconduct after the separation. Each case must depend upon its own particular circumstances: as the husband will continue liable for necessities supplied to the wife, until the fact that she has withdrawn herself from his protection has become notorious. Bright on Husband and Wife, Vol. 2. § 11. So when it is notorious that she has rightly withdrawn, he would continue to be liable to third parties, until it has become notorious, or at least can be brought home to the person furnishing her with necessities that she is no longer entitled to support and protection from her husband.

The adulterous conduct of the wife with the connivance of the husband, or at least without such a separation as would make her misconduct notorious, would not, *per se*, operate as a defense, and protect the husband from liability. Schouler on Domestic Relations, page 92.

Norton vs. Fazan, 1 Bos. and Puller, 226. This case is not fully in point.

But as a matter of reason it would follow that it is not every suspicion of adultery that a husband might raise in a trial for necessities furnished his wife that would free him from responsibility. It might be different if she was living openly with a paramour, or her evil life could be brought home to the plaintiff—though even that position would seem to be denied in the case of *Needham vs. Bremner*, 1 Law Rep., C. P. Cases, 588—in which case it was held that though the wife had been found guilty of adultery in a Divorce Court, and the husband had likewise been found guilty, so that no divorce was decreed, the husband was held liable for the wife's maintenance. Thus it is evident that the instruction prayed for must necessarily have been refused; and the case of *Needham vs. Bremner*, above cited, fully sustains the instruction given in lieu of the instruction

asked. If the adulterous intercourse of the wife should be notorious and known to the tradesmen, this Court would hereafter instruct the jury that the husband would be free from his liability. But it would be necessary to show not only the adultery, but the knowledge of the plaintiff, or the notoriety of the wrongful living, so that the committing of adultery would not be the only thing to be proved, but the knowledge of the plaintiff, or the notoriety, would be the gist of the proof which would be required to discharge the husband from his liability.

In this case there is no allegation that there was any proof offered to show what it is above intimated would be necessary, and if no testimony was offered of that kind, it is to be presumed that none can be offered. In fine, it is not the act of adultery of the wife that will free the husband from his responsibility, but the living in adultery and the notoriety of the life or of the acts.

The exceptions are overruled.

S. B. Dole for plaintiff.

E. Preston and *L. McCully* for defendant.

Honolulu, November 3d, 1876.

IN MEMORIAM.

HON. BENJAMIN HALE AUSTIN,
SECOND ASSOCIATE JUSTICE OF THE SUPREME COURT.

DIED, AT HONOLULU, JULY 5, 1885.

At the opening of the Supreme Court on Tuesday, July 7, 1885, Chief Justice Judd and Associate Justice McCully being on the bench, the following proceedings were had :

After the formal opening of the Court by the Marshal, His Excellency PAUL NEUMANN, Attorney-General, arose and addressed the Court as follows :

YOUR HONORS: The mournful task has been committed to me by the members of the bar to move the acceptance and entry on

the minutes of this Court of resolutions condolatory upon the death of Benjamin Hale Austin, lately one of the Honorable Justices of this Court.

May I say of him that I regret nothing more than the scantiness of time during which I had the pleasure and benefit of acquaintance with the deceased gentleman: scarcely two years—a span in a whole lifetime—yet sufficient to have learned and appreciated the many noble and excellent qualities which graced this man. His uprightness, the conscientiousness with which he, regardless of physical ailment, attended to official duties, his fairness and impartiality, were not his only attributes to command our respect and elicit our praise. No one who knew him could have failed to admire the fortitude which he evinced during the long and terrible trial to which he was subjected during the latter part of his life.

In no wise could nobility of mind and true Christian spirit become more conspicuous than in this good man's behavior to his family, his friends, and all others who came in contact with him; than in his unselfishness, in his urbanity, and in the exemplary patience with which he bore his sufferings. *Nihil tam acerbum est in quo non aequus animus solatium inveniat.* There is no suffering so hard but in it the patient mind may find some comfort. One of the salient virtues of our departed friend was, that even intense suffering never could deflect his ways from a conscientious performance of duty, nor prevent him from maintaining a cheerful spirit and a lovable patience, which proved to be a consolation to his sympathizing relatives and friends. If there is a hereafter; if there exists an immortal part in man—and I do not doubt it—then truly to this good, faithful and suffering man, "Death is the crown of life."

For him survives the memory of his unblemished character as man and judge, the memory of his considerateness to all who surrounded him during the many days and nights of suffering which it was his hard lot to pass; the memory of the faithfulness with which he performed his tasks in life.

To his worth we pay this tribute, perhaps ephemeral, bound in the weak tissue of this perishable scroll, but I may say for those in whose name it is presented, that it is not, as often occurs, an

empty phrasing fitted for the occasion, but that it emanates from that sincere respect which follows the thorough appreciation of virtue and merit. I shall now, by leave of Your Honors, read the

RESOLUTIONS PRESENTED BY THE BAR OF HONOLULU.

WHEREAS, God in His wise providence has removed the Honorable Benjamin Hale Austin, Second Associate Justice of the Supreme Court, by death, be it

Resolved, That while we bow in submissive resignation to the loss which we have suffered in the removal by death of Judge Austin from his official duties as a Justice of the Supreme Court, we hereby record our appreciation of his unfailing courtesy, and his cheerful and faithful attention to the responsible duties of his position, even while afflicted with severe and painful bodily illness:

That we hereby express to the family of the deceased our sincere condolence and our sympathy with them in their bereavement:

That the Bar wear crape on the left arm for thirty days in respect of the deceased:

That this resolution be recorded upon the minutes of the Supreme Court, and that copies be forwarded to the widow and brothers of the deceased.

Mr. A. S. HARTWELL said: Your Honors, I rise to second the motion of His Excellency the Attorney-General. The event that has brought us together is still so fresh in my mind that I do not trust myself to utter extemporaneously the few words that I would say.

Our friend Austin's long and weary struggle with life is over. How bravely, how patiently and uncomplainingly, how evenly, he bore it! During the nine years that I have known him, I never heard a murmur escape his lips, although during all that time he must have suffered constant bodily discomfort. How little we, who have prided ourselves on our strength, can know of the anguish of mind with which he found himself debarred from bodily activities. Not one in ten thousand would have taken his lot so sweetly, would have retained and kept in full exercise and control his intellectual faculties to the last as finely as did Judge Austin. It was a superb thing to do. His example may

well teach us to "learn how divine a thing it is to suffer and be strong."

Judge Austin's mental traits were those of a careful and patient thinker. He brought to the Bench a mind prepared by many years of training at the law in his native State of New York; a firmness not carried to the extreme of obstinacy; integrity unalloyed by self-righteousness; a desire to be impartial; a sincerity and singleness of purpose which could not be doubted.

The best of human judgment is frail and liable to error, but no one can say that any judicial ruling of our deceased friend was clouded or distorted by self-interest, by passion, prejudice or conceit.

His last words, of which I have heard—spoken to her in the presence of whose grief we must fain be silent—were characteristic of the man: "It is all right!" When our time shall come, may we too be able to say, "It is all right."

Messrs. J. W. KALUA and M. THOMPSON made some appropriate remarks—the former in the Hawaiian language—and ASSOCIATE JUSTICE McCULLY addressed the bar as follows:

Gentlemen of the Bar: I heard of the appointment of Judge Austin to the Bench while absent at the November Term in Wai-mea, Hawaii. It was somewhat of a surprise to me, but I heard it with great pleasure. We had been friends—I may say intimate friends—since we met at his first visit here. I felt that he had both disadvantages and advantages for his office. It was a disadvantage, in regard to much business, that he was a stranger in the country, unacquainted with what had been done in our Courts, with the history of our land titles, and altogether unacquainted with the Hawaiian language. Another disadvantage was that of infirmity of body which would, to an extent, hinder him from traveling, and even make it a difficult matter to go from room to room.

On the other hand, he was a lawyer of long experience in the Courts of New York, a State from which, as well as from New England, we draw much of our jurisprudence; and against all difficulties, he had that heroic undiscouragement, that perpetual and invincible cheerfulness of which you all speak, which was his most impressive characteristic. As to his going on circuits, it

was his wish, and it seemed to us that he should go on a fair proportion. It would not do to assume at the outset of taking office that he was incapable of discharging an important, though often laborious, portion of its duties.

With what enlivening cheerfulness—we may say hilarity—he supported himself on these journeys you all are witness. He never posed as a sufferer; he never made an exhibition of his patience and fortitude. His cheeriness drew all men of every degree whom he met towards him to give him all aid, and consider that it was their pleasure to serve him.

His work in this Court was done in about three and a half years. Of the quality of that work, it will be less becoming for me to speak, and as for the rest, my relations with him and with his family were of such intimate, personal friendship, that I should obtrude too much of my own feelings were I to speak at large.

We are all at one on this occasion; we are sincere in our admiration and our most loving remembrance.

The CHIEF JUSTICE closed the proceedings with the following remarks:

BRETHREN: On the 7th of November, 1881, I had the pleasure of handing His Majesty's commission to Mr. Austin and of welcoming him to the bench of the Supreme Court, in which there was a vacancy, on the advancement of Mr. Justice McCully to the position of First Associate Justice.

That he performed the responsible duties of this high office with impartiality, ability and absolute integrity is true. The infirmity which burdened and imprisoned his body during these years—of which we all speak with unpremeditated coincidence by language—shut him out from participating in many of the activities of life. But to a Judge this seclusion was, in one sense, an advantage, for he thus had more opportunity for undisturbed reflection and deliberate judgment.

Judge Austin's temperament was by nature remarkably cheerful, sunny and charitable. Few, I may say none of us, could have borne the disability which he suffered with the fortitude and uncomplaining submission that he did. What an example of patience he has left to this community! No murmur nor expression of dissatisfaction even, ever escaped his lips. His strong

and sonorous voice indicated an ever cheerful and buoyant heart.

During the three years and a half since Judge Austin's elevation to the bench he shrank from no duty, and was always ready to bear his proportion of the work of preparing opinions. To patient research into precedent and authority he was peculiarly fitted. For, trained as he was at the bar of Erie county, New York State, amid the close competition of the lawyers of the Empire State, he brought to our aid just what was needed, a disciplined and discriminating mind, well grounded in the principles of the common law. When he had gone through a case and reviewed the authorities we felt assured that nothing was left unnoticed.

His intellectual conscientiousness made it impossible for him to adhere to a position which reflection convinced him was unsound. But when judgment and conscience coincided, he was like a rock of adamant. Such, a Judge should ever be. His written opinions show these characteristics. His share of the more irksome part of the judicial service—the holding of terms of the Circuit Court—he was always ready to bear. The assignments made at the beginning of this year gave him the last (April) term of this Court, and next month he was to attend at Kauai. He was hopeful to the last, and within a few days of his decease he expressed to me the hope of being able to accomplish his duty.

But his life's work is done! This vacant chair—the solemn services of yesterday—all testify to this. His fettered spirit is released. We have only his work and his memory left.

The resolutions you have presented, the touching remarks of the brethren of the bar, meet with the cordial sympathy of the Court, and will be full of consolation to the family and friends of the deceased.

The Clerk will enter the resolutions on the records of the Court.

CONSTITUTION
OF THE
HAWAIIAN ISLANDS.

SIGNED BY
HIS MAJESTY KALAKAUA,

JULY 6, AND PROMULGATED JULY 7, 1887.

WHEREAS, the Constitution of this Kingdom heretofore in force contains many provisions subversive of civil rights and incompatible with enlightened Constitutional Government:

And WHEREAS, it has become imperative in order to restore order and tranquillity and the confidence necessary to a further maintenance of the present Government that a new Constitution should be at once promulgated:

NOW THEREFORE, I, Kalakaua, King of the Hawaiian Islands, in my capacity as Sovereign of this Kingdom, and as the representative of the people hereunto by them duly authorized and empowered, do annul and abrogate the Constitution promulgated by Kamehameha the Fifth, on the 20th day of August, A. D., 1864, and do proclaim and promulgate this Constitution.

ARTICLE 1. God hath endowed all men with certain inalienable rights, among which are life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

ARTICLE 2. All men are free to worship God according to the

dictates of their own consciences ; but this sacred privilege hereby secured, shall not be so construed as to justify acts of licentiousness, or practices inconsistent with the peace or safety of the Kingdom.

ARTICLE 3. All men may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and no law shall be enacted to restrain the liberty of speech, or of the press.

ARTICLE 4. All men shall have the right, in an orderly and peaceable manner, to assemble, without arms, to consult upon the common good, and to petition the King or Legislature for redress of grievances.

ARTICLE 5. The privilege of the writ of *Habeas Corpus* belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 7. No person shall be held to answer for any crime or offense, (except in cases of impeachment, or for offenses within the jurisdiction of a Police or District Justice, or in summary proceedings for contempt), unless upon indictment, fully and plainly describing such crime or offense, and he shall have the right to meet the witnesses who are produced against him face to face ; to produce witnesses and proofs in his own favor ; and by himself or his counsel, at his election, to examine the witnesses produced by himself, and cross-examine those produced against him, and to be fully heard in his own defence. In all cases in which the right of trial by Jury has been heretofore used, it shall be held inviolable forever, except in actions of debt or assumpsit in which the amount claimed is less than Fifty Dollars.

ARTICLE 8. No person shall be required to answer again for an offense, of which he has been duly convicted, or of which he has been duly acquitted.

ARTICLE 9. No person shall be compelled, in any criminal case,

to be a witness against himself ; nor be deprived of life, liberty, or property without due process of law.

ARTICLE 10. No person shall sit as a judge or juror, in any case in which his relative, by affinity, or by consanguinity within the third degree, is interested, either as plaintiff or defendant, or in the issue of which the said judge or juror, may have, either directly or through such relative, any pecuniary interest.

ARTICLE 11. Involuntary servitude, except for crime, is forever prohibited in this Kingdom. Whenever a slave shall enter Hawaiian Territory, he shall be free.

ARTICLE 12. Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and effects ; and no warrants shall issue, except on probable cause, supported by oath or affirmation, and describing the place to be searched, and the persons or things to be seized.

ARTICLE 13. The Government is conducted for the common good, and not for the profit, honor, or private interest of any one man, family, or class of men.

ARTICLE 14. Each member of society has a right to be protected in the enjoyment of his life, liberty and property, according to law ; and, therefore, he shall be obliged to contribute his proportional share to the expense of this protection, and to give his personal services, or an equivalent when necessary. Private property may be taken for public use but only upon due process of law and just compensation.

ARTICLE 15. No subsidy, duty, or tax, of any description, shall be established or levied without the consent of the Legislature ; nor shall any money be drawn from the Public Treasury without such consent, except when between the sessions of the Legislature, the emergencies of war, invasion, rebellion, pestilence, or other public disaster shall arise, and then not without the concurrence of all the Cabinet, and of a majority of the whole Privy Council ; and the Minister of Finance shall render a detailed account of such expenditure to the Legislature.

ARTICLE 16. No retrospective laws shall ever be enacted.

ARTICLE 17. The Military shall always be subject to the laws

of the land ; and no soldier shall, in time of peace, be quartered in any house without the consent of the owner ; nor in time of war, but in a manner to be prescribed by the Legislature.

ARTICLE 18. Every Elector shall be privileged from arrest on election days, during his attendance at election, and in going to and returning therefrom, except in case of treason, felony, or breach of the peace.

ARTICLE 19. No Elector shall be so obliged to perform military duty, on the day of election, as to prevent his voting ; except in time of war, or public danger.

ARTICLE 20. The Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial ; these shall always be preserved distinct, and no Executive or Judicial officer, or any contractor, or employee of the Government, or any person in the receipt of salary or emolument from the Government, shall be eligible to election to the Legislature of the Hawaiian Kingdom, or to hold the position of an elective member of the same. And no member of the Legislature shall, during the time for which he is elected, be appointed to any civil office under the Government, except that of a member of the Cabinet.

ARTICLE 21. The Government of this Kingdom is that of a Constitutional Monarchy, under His Majesty Kalakaua, His Heirs and Successors.

ARTICLE 22. The Crown is hereby permanently confirmed to His Majesty Kalakaua, and to the Heirs of His body lawfully begotten, and to their lawful Descendants in a direct line ; failing whom, the Crown shall descend to Her Royal Highness the Princess Liliuokalani, and the heirs of her body, lawfully begotten, and their lawful descendants in a direct line. The Succession shall be to the senior male child, and to the heirs of his body ; failing a male child, the succession shall be to the senior female child, and to the heirs of her body. In case there is no heir as above provided, the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim during the Sovereign's life ; but should there be no such appointment and proclamation, and the Throne should become vacant, then the Cabinet, immediately after the occurring of such vacancy, shall

cause a meeting of the Legislature, who shall elect by ballot some native Alii of the Kingdom as Successor to the Throne; and the Successor so elected shall become a new *Stirps* for a Royal Family; and the succession from the Sovereign thus elected, shall be regulated by the same law, as the present Royal Family of Hawaii.

ARTICLE 23. It shall not be lawful for any member of the Royal Family of Hawaii who may by Law succeed to the Throne, to contract Marriage without the consent of the Reigning Sovereign. Every Marriage so contracted shall be void, and the person so contracting a Marriage, may, by the proclamation of the Reigning Sovereign, be declared to have forfeited His or Her right to the Throne, and after such proclamation, the Right of Succession shall vest in the next Heir as though such offender were dead.

ARTICLE 24. His Majesty Kalakaua, will, and his Successors shall take the following oath: I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.

ARTICLE 25. No person shall ever sit upon the Throne, who has been convicted of any infamous crime, or who is insane, or an idiot.

ARTICLE 26. The King is the Commander-in-Chief of the Army and Navy, and of all other Military Forces of the Kingdom, by sea and land. But he shall never proclaim war without the consent of the Legislature; and no military or naval force shall be organized except by the authority of the Legislature.

ARTICLE 27. The King, by and with the advice of His Privy Council, and with the consent of the Cabinet, has the power to grant reprieves and pardons, after conviction, for all offenses, except in case of impeachment.

ARTICLE 28. The King convenes the Legislature at the seat of Government, or at a different place, if that should become insecure from an enemy or any dangerous disorder, and prorogues the same; and in any great emergency he may, with the advice of the Privy Council, convene the Legislature in extraordinary Session.

ARTICLE 29. The King has the power to make Treaties. Treaties involving changes in the Tariff or in any law of the King-

dom, shall be referred for approval to the Legislature. The King appoints Public Ministers, who shall be commissioned, accredited, and instructed agreeably to the usage and law of nations.

ARTICLE 30. It is the King's Prerogative to receive and acknowledge Public Ministers; to inform the Legislature by Royal Message, from time to time, of the state of the Kingdom; and to recommend to its consideration such measures as he shall judge necessary and expedient.

ARTICLE 31. The person of the King is inviolable and sacred. His Ministers are responsible. To the King and the Cabinet belongs the Executive power. All laws that have passed the Legislature, shall require His Majesty's signature in order to their validity, except as provided in Article 48.

ARTICLE 32. Whenever, upon the decease of the Reigning Sovereign, the Heir shall be less than eighteen years of age, the Royal Power shall be exercised by a Regent or Council of Regency, as hereinafter provided.

ARTICLE 33. It shall be lawful for the King at any time when he may be about to absent himself from the Kingdom, to appoint a Regent or Council of Regency, who shall administer the Government in His name; and likewise the King may, by His last Will and Testament, appoint a regent or Council of Regency to administer the Government during the minority of any Heir to the Throne; and should a Sovereign decease, leaving a minor Heir, and having made no last Will and Testament, the Cabinet at the time of such decease shall be a Council of Regency, until the Legislature, which shall be called immediately, be assembled and the Legislature immediately that it is assembled shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the powers which are constitutionally vested in the King, until such heir shall have attained the age of eighteen years, which age is declared to be the legal majority of such Sovereign.

ARTICLE 34. The King is Sovereign of all the Chiefs and of all the people.

ARTICLE 35. All Titles of Honor, Orders, and other distinctions, emanate from the King.

ARTICLE 36. The King coins money and regulates the currency, by law.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom, or any part of it, under martial law.

ARTICLE 38. The National Ensign shall not be changed, except by Act of the Legislature.

ARTICLE 39. The King cannot be sued or held to account in any Court or tribunal of the Kingdom.

ARTICLE 40. There shall continue to be a Council of State, for advising the King in all matters for the good of the State, wherein He may require its advice, which Council shall be called the King's Privy Council of State, and the members thereof shall be appointed by the King, to hold office during His Majesty's pleasure, and which Council shall have and exercise only such powers as are given to it by the Constitution.

ARTICLE 41. The Cabinet shall consist of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney-General, and they shall be His Majesty's special advisers in the executive affairs of the Kingdom; and they shall be *ex officio* members of His Majesty's Privy Council of State. They shall be appointed and commissioned by the King and shall be removed by him, only upon a vote of want of confidence passed by a majority of all the elective members of the Legislature, or upon conviction of felony, and shall be subject to impeachment. No act of the King shall have any effect unless it be countersigned by a member of the Cabinet, who by that signature makes himself responsible.

ARTICLE 42. Each member of the Cabinet shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks. The Cabinet hold seats *ex officio*, in the Legislature, with the right to vote, except on a question of want of confidence in them.

ARTICLE 43. The Minister of Finance shall present to the Legislature in the name of the Government, on the first day of each Biennial Session, the Financial Budget, in the Hawaiian and English languages.

ARTICLE 44. The Legislative power of the Kingdom is vested in the King and the Legislature, which shall consist of the Nobles and Representatives sitting together.

ARTICLE 45. The Legislative Body shall be styled the Legislature of the Hawaiian Kingdom, and shall assemble, biennially, in the month of May. The first regular Session shall be held in the year of our Lord Eighteen Hundred and Eighty-eight.

ARTICLE 46. Every member of the Legislature shall take the following oath: I solemnly swear, in the presence of Almighty God, that I will faithfully support the Constitution of the Hawaiian Kingdom, and conscientiously and impartially discharge my duties as a member of the Legislature.

ARTICLE 47. The Legislature has full power and authority to amend the Constitution as hereinafter provided; and from time to time to make all manner of wholesome laws, not repugnant to the Constitution.

ARTICLE 48. Every Bill which shall have passed the Legislature, shall, before it becomes law, be presented to the King. If he approve he shall sign it and it shall thereby become a law, but, if not, he shall return it, with his objections, to the Legislature, which shall enter the objections at large on their journal and proceed to re-consider it. If after such re-consideration it shall be approved by a two-thirds vote of all the elective members of the Legislature it shall become a law. In all such cases the votes shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the journal of the Legislature. If any Bill shall not be returned by the King within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature by their adjournment prevent its return, in which case it shall not be a law.

ARTICLE 49. The Legislature shall be the judge of the qualifications of its own members, except as may hereafter be provided by law, and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as the Legislature may provide.

ARTICLE 50. The Legislature shall choose its own officers and determine the Rules of its own proceedings.

ARTICLE 51. The Legislature shall have authority to punish by imprisonment, not exceeding thirty days, every person, not a member, who shall be guilty of disrespect to the Legislature by any disorderly or contemptuous behavior in its presence; or who, during the time of its sitting, shall publish any false report of its proceedings, or insulting comments upon the same; or who shall threaten harm to the body or estate of any of its members for anything said or done in the Legislature; or who shall assault any of them therefor, or who shall assault or arrest any witness, or other person ordered to attend the Legislature, on his way going or returning; or who shall rescue any person arrested by order of the Legislature.

ARTICLE 52. The Legislature may punish its own members for disorderly behavior.

ARTICLE 53. The Legislature shall keep a journal of its proceedings; and the yeas and nays of the members, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

ARTICLE 54. The Members of the Legislature shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the Sessions of the Legislature, and in going to and returning from the same; provided such privilege as to going and returning shall not cover a period of over twenty days; and they shall not be held to answer for any speech or debate made in the Legislature, in any Court or place whatsoever.

ARTICLE 55. The Representatives shall receive for their services a compensation to be determined by law, and paid out of the Public Treasury, but no increase of compensation shall take effect during the biennial term in which it shall have been made; and no law shall be passed increasing the compensation of Representatives beyond the sum of two hundred and fifty dollars each for each biennial term.

ARTICLE 56. A Noble shall be a subject of the Kingdom, who shall have attained the age of twenty-five years and resided in the

Kingdom three years, and shall be the owner of taxable property in this Kingdom of the value of three thousand dollars over and above all encumbrances, or in receipt of an income of not less than six hundred dollars per annum.

ARTICLE 57. The Nobles shall be a Court, with full and sole authority to hear and determine all impeachments made by the Representatives, as the Grand Inquest of the Kingdom, against any officers of the Kingdom, for misconduct or mal-administration in their offices; but previous to the trial of every impeachment the Nobles shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence and law. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this Government; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment and punishment according to the laws of the land.

ARTICLE 58. Twenty-four Nobles shall be elected as follows: Six from the Island of Hawaii; six from the Islands of Maui, Molokai and Lanai; nine from the Island of Oahu; and three from the Islands of Kauai and Niihau. At the first election held under this Constitution, the Nobles shall be elected to serve until the general election to the Legislature for the year of our Lord, 1890, at which election, and thereafter, the Nobles shall be elected at the same time and places as the Representatives. At the election for the year of our Lord 1890, one-third of the Nobles from each of the divisions aforesaid, shall be elected for two years, and one-third for four years, and one-third for six years, and the electors shall ballot for them for such terms, respectively; and at all subsequent general elections they shall be elected for six years. The Nobles shall serve without pay.

ARTICLE 59. Every male resident of the Hawaiian Islands, of Hawaiian, American or European birth or descent, who shall have attained the age of twenty years, and shall have paid his taxes, and shall have caused his name to be entered on the list of voters for Nobles for his District, shall be an elector of Nobles, and shall be entitled to vote at any election of Nobles, provided:

First: That he shall have resided in the country not less than

three years, and in the district in which he offers to vote, not less than three months immediately preceding the election at which he offers to vote :

Second: That he shall own and be possessed, in his own right, of taxable property in this country of the value of not less than three thousand dollars over and above all incumbrances, or shall have actually received an income of not less than six hundred dollars during the year next preceding his registration for such election :

Third: That he shall be able to read and comprehend an ordinary newspaper printed in either the Hawaiian, English or some European language :

Fourth: That he shall have taken an oath to support the Constitution and laws, such oath to be administered by any person authorized to administer oaths, or by any Inspector of Elections :

Provided however, that the requirements of a three years' residence and of ability to read and comprehend an ordinary newspaper, printed either in the Hawaiian, English or some European language, shall not apply to persons residing in the Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this Constitution.

ARTICLE 60. There shall be twenty-four Representatives of the People elected biennially, except those first elected under this Constitution, who shall serve until the general election for the year of our Lord, 1890. The representation shall be based upon the principles of equality and shall be regulated and apportioned by the Legislature according to the population to be ascertained from time to time by the official census. But until such apportionment by the Legislature, the apportionment now established by law shall remain in force, with the following exceptions, namely : there shall be but two Representatives for the Districts of Hilo and Puna on the Island of Hawaii, but one for the Districts of Lahaina and Kaanapali on the Island of Maui, and but one for the Districts of Koolauloa and Waialua on the Island of Oahu.

ARTICLE 61. No person shall be eligible as a Representative

of the People, unless he be a male subject of the Kingdom, who shall have arrived at the full age of twenty-one years; who shall know how to read and write either the Hawaiian, English or some European language; who shall understand accounts; who shall have been domiciled in the Kingdom for at least three years, the last of which shall be the year immediately preceding his election; and who shall own real estate within the Kingdom of a clear value, over and above all incumbrances, of at least five hundred dollars; or who shall have an annual income of at least two hundred and fifty dollars, derived from any property or some lawful employment.

ARTICLE 62. Every male resident of the Kingdom, of Hawaiian, American, or European birth or descent, who shall have taken an oath to support the Constitution and laws in the manner provided for electors of Nobles; who shall have paid his taxes; who shall have attained the age of twenty years; and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall know how to read and write either the Hawaiian, English or some European language; (if born since the year 1840,) and shall have caused his name to be entered on the list of voters of his district as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that district, provided however, that the requirements of being domiciled in the Kingdom for one year immediately preceding the election, and of knowing how to read and write, either the Hawaiian, English, or some European language, shall not apply to persons residing in this Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this Constitution.

ARTICLE 63. No person shall sit as a Noble or Representative in the Legislature unless elected under, and in conformity with, the provisions of this Constitution. The property or income qualification of Representatives, of Nobles, and of Electors of Nobles, may be increased by law; and a property or income qualification of Electors of Representatives, may be created and altered by law.

ARTICLE 64. The Judicial Power of the Kingdom shall be

vested in one Supreme Court, and in such inferior Courts as the Legislature may, from time to time, establish.

ARTICLE 65. The Supreme Court shall consist of a Chief Justice, and not less than two Associate Justices, any of whom may hold the Court. The Justices of the Supreme Court shall hold their offices during good behavior, subject to removal upon impeachment, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. *Provided however*, that any Judge of the Supreme Court or any other Court of Record may be removed from office, on a resolution passed by two-thirds of all the members of the Legislature, for good cause shown to the satisfaction of the King. The Judge against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least ten days before the day on which the Legislature shall act thereon. He shall be heard before the Legislature.

ARTICLE 66. The Judicial Power shall be divided among the Supreme Court and the several inferior Courts of the Kingdom, in such manner as the Legislature may, from time to time, prescribe, and the tenure of office in the inferior Courts of the Kingdom shall be such as may be defined by the law creating them.

ARTICLE 67. The Judicial Power shall extend to all cases in law and equity, arising under the Constitution and laws of this Kingdom, and Treaties made, or which shall be made under their authority, to all cases affecting Public Ministers and Consuls, and to all cases of Admiralty and Maritime jurisdiction.

ARTICLE 68. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex officio* President of the Nobles in all cases of impeachment, unless when impeached himself; and shall exercise such jurisdiction in equity or other cases as the law may confer upon him; his decisions being subject, however, to the revision of the Supreme Court on appeal. Should the Chief Justice ever be impeached, some person specially commissioned by the King shall be President of the Court of Impeachment during such trial.

ARTICLE 69. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties.

ARTICLE 70. The King, His Cabinet, and the Legislature shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions.

ARTICLE 71. The King appoints the Justices of the Supreme Court, and all other Judges of Courts of Record. Their salaries are fixed by law.

ARTICLE 72. No Judge or Magistrate shall sit alone on an appeal or new trial, in any case on which he may have given a previous judgment.

ARTICLE 73. The following persons shall not be permitted to register for voting, to vote, or to hold office under any department of the Government, or to sit in the Legislature, namely: Any person who is insane or an idiot, or any person who shall have been convicted of any of the following named offenses, viz: Arson, Barratry, Bribery, Burglary, Counterfeiting, Embezzlement, Felonious Branding of Cattle, Forgery, Gross Cheat, Incest, Kidnapping, Larceny, Malicious Burning, Manslaughter in the First Degree, Murder, Perjury, Rape, Robbery, Sodomy, Treason, Subornation of Perjury, and Malfeasance in Office, unless he shall have been pardoned by the King and restored to his Civil Rights, and by the express terms of his pardon declared to be eligible to offices of Trust, Honor and Profit.

ARTICLE 74. No officer of this Government shall hold any office, or receive any salary from any other Government or Power whatever.

ARTICLE 75. The Legislature votes the Appropriations biennially, after due consideration of the revenue and expenditure for the two preceding years, and the estimates of the revenue and expenditure of the two succeeding years, which shall be submitted to them by the Minister of Finance.

ARTICLE 76. The enacting style in making and passing all Acts and Laws shall be, "Be it enacted by the King, and the Legislature of the Hawaiian Kingdom."

ARTICLE 77. To avoid improper influences which may result from intermixing in one and the same Act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in its title.

ARTICLE 78. Wherever by this Constitution any Act is to be done or performed by the King or the Sovereign, it shall, unless otherwise expressed, mean that such Act shall be done and performed by the Sovereign by and with the advice and consent of the Cabinet.

ARTICLE 79. All Laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws heretofore enacted, or that may hereafter be enacted, which are contrary to this Constitution, shall be null and void.

ARTICLE 80. The Cabinet shall have power to make and publish all necessary rules and regulations for the holding of any election or elections under this Constitution, prior to the passage by the Legislature of appropriate laws for such purpose, and to provide for administering to officials, subjects and residents the oath to support this Constitution. The first election hereunder shall be held within ninety days after the promulgation of this Constitution, and the Legislature then elected may be convened at Honolulu upon the call of the Cabinet Council, in extraordinary session at such time as the Cabinet Council may deem necessary, thirty days notice thereof being previously given.

ARTICLE 81. This Constitution shall be in force from the 7th day of July, A. D., 1887, but that there may be no failure of justice, or inconvenience to the Kingdom, from any change, all officers of this Kingdom, at the time this Constitution shall take effect, shall have, hold, and exercise all the power to them granted. Such officers shall take an oath to support this Constitution, within sixty days after the promulgation thereof.

ARTICLE 82. Any amendment or amendments to this Constitution may be proposed in the Legislature and if the same shall be agreed to by a majority of the members thereof, such proposed amendment or amendments shall be entered on its journal, with

the yeas and nays taken thereon, and referred to the next Legislature; which proposed amendment or amendments shall be published for three months previous to the next election of Representatives and Nobles; and if in the next Legislature such proposed amendment or amendments shall be agreed to by two-thirds of all the members of the Legislature, such amendment or amendments shall become part of the Constitution of this Kingdom.

KALAKAUA REX.

By the King,

W. L. GREEN,

Minister of Finance.

HONOLULU, } ss.
OAHU. }

I, KALAKAUA, King of the Hawaiian Islands, in the presence of Almighty God, do solemnly swear to maintain this Constitution whole and inviolate, and to govern in conformity therewith.

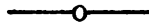
KALAKAUA REX.

Subscribed and sworn to
before me this sixth day
of July, A. D. 1887.

A. F. JUDD,

*Chief Justice of the Supreme Court,
and Chancellor of the Kingdom.*

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 Coney vs. Manele, IV. 154: see *Robello vs. Wong Quing*, 98.
 Fallon vs. Robinson, II. 227: see *Nott vs. Burgess*, 420.
 Fallon vs. Robinson, II. 227: see *Parke vs. Lau Ng*, 516.
 Forbes vs. Gibson, III. 260: see *Merrill vs. Jaeger*, 484.
 Foster vs. Luailalani, IV. 477: see *Merrill vs. Jaeger*, 484.
 Hang Lung Kee vs. Bick'n, IV. 554: see *See Hop vs. Chil'th*, 538.
 Hasslocher vs. Robinson, III. 802: see *Estate of Boardman*, 149.
 Johnson vs. Tisdale, IV. 605: see *Hackfeld vs. Ing Choi*, 139.
 Kaaihue vs. Crabbe, III. 776: see *Robello vs. Wong Quing*, 98.
 Kahiuka vs. Hobron, IV. 227: see *Estate of Bishop*, 289.
 Kalaeokekoi vs. Kahanu IV. 481: see *The King vs. Makaweo*, 64.

- Kalakaua vs. Harris, III. 27: see Peacock vs. Lovejoy, 231.
 Kalakaua vs. Keaweamahl, IV. 577: see Kela vs. Pahuilima, 528.
 Kalakaua vs. Keaweamahi, IV. 577: see Kalaeokekol vs. Kahele, 51.
 Kalua vs. Kamaua, IV. 58: see Mitchell, vs. Mitchell, 161.
 Kamalu vs. Lovell, IV. 601: see Ah Chu vs. Sung Kwong Wo, 291.
 Kamohai vs. Kahele, III. 533: see Kela vs. Pahuilima, 528.
 Kapela vs. Hoochoku, IV. 513: see Estate of Kaualii, 150.
 Keahi vs. Bishop, III. 546: see Rose vs. Smith, 377.
 Keahi vs. Bishop, III. 546: see Holeluea vs. Kapu, 307.
 King, The, vs. Agnee, III. 106: see Puukalakea vs. Hiaa, 486.
 King, The, vs. Asegut, III. 528: see Merrill vs. Jaeger, 484.
 King, The, vs. Cordwell, III. 154: see Merrill vs. Jaeger, 484.
 King, The, vs. Kahalewai, III. 465: see The King vs. Keanu, 173.
 King, The, vs. Kalaluhii, III. 417: see The King vs. Helelilili, 18.
 King, The, vs. Kanaau, III. 669: see The King vs. Ah Lin, 59.
 King, The, vs. Sherman, I. 88: see The King vs. Bridges, 473.
 King, The, vs. Tong Lee, IV. 335: see Segregation of Lepers, 166.
 Kukilahu vs. Gill, I. 54: see Kaal vs. Mahuka, 354.
 Makea vs. Nalua, IV. 221: see Estate of Bishop, 289.
 Makee vs. Dominis, III. 579: see Sing Chong vs. Hutchinson, 454.
 Maule vs. Waihee Co., IV. 637: see Achi vs. Kauwa, 299.
 McKibbin vs. Spencer, III. 574: see Nott vs. Burgess, 422.
 Montgomery vs. Pfluger, III. 388: see Merrill vs. Jaeger, 484.
 Nahinal vs. Lai, III. 317: see Un Wong vs. Kan Chu, 225.
 Nanino, Will of, II. 762: see Kahui vs. Lauki, 296.
 Paahana vs. Bila, III. 725: see Kenway vs. Notley, 124.
 Paahana vs. Bila, III. 725: see Wallehua vs. Lio, 519.
 Paakuku vs. Komoikehuehu, III. 642: Estate of Bishop, 290.
 Paakuku vs. Komoikehuehu, III. 642: see Coleman vs. Coleman, 300.
 Raymond vs. Dole, IV. 232: see Fowler vs. Heeia Co., 414.
 Rex, see King, The
 Richardson vs. Harding, II. 433: see Gibson vs. Sopcr, 387.
 Rooke vs. Nicholson, I. 288: see Swan vs. Colburn, 394.
 Stone vs. Allen, III. 621: see Herring vs. Gulick, 57.
 Stone vs. Hutchinson, IV. 124: see McCrosson vs. Cummings, 392.
 Tenorio vs. Brown, IV. 663: see Rose vs. Smith, 380.
 Wight vs. Jones, III. 755: see Merrill vs. Jaeger, 484.
 Wood vs. Afo, III. 448: see Rickard vs. Couto, 514.
 Wood vs. Hookina, III. 102: see Rickard vs. Couto, 514.

CHARGE TO JURY, see COURT AND JURY.

CHARTER, see CORPORATION, 1, 8.

CHARTER-PARTY, see ADMIRALTY, 1.

CHECK, see NEGOTIABLE INSTRUMENTS.

CHOSSES IN ACTION, see HUSBAND AND WIFE, 4, 5.

CIRCUIT COURT.

1. Appeal from Circuit Judge at Chambers lies only to Circuit Court of same circuit. *Board of Immigration vs. Sousa*, 588.
2. Appeal lies from Circuit Judge at Chambers to Supreme Court. *The King vs. Aiona*, 142.

CITIZEN, see **ALIEN**; **MANDAMUS**, 1, 5; **MINISTER OF INTERIOR**, 2.

CLERK OF COURT.

1. In his absence a paper for filing should be left with a deputy-clerk, or placed on clerk's desk; if lost, meanwhile, it is at owner's risk. *Hackfeld vs. Ing Choi*, 9.
2. Clerk's failure to enter judgment will not prejudice parties: it may be entered *nunc pro tunc*. *Rose vs. Smith*, 377.

COMMISSIONERS OF BOUNDARIES, see **BOUNDARY**.

COMMISSIONERS OF CROWN LANDS.

1. Payment of rent to the Land Agent binds the Board. *Bishop vs. Commissioners*, 242.
2. Commissioners held liable for breach of covenant of quiet enjoyment in a lease. *Ib.*
3. Commissioners of Crown Lands are public officers. *Gibson vs. Soper*, 883.
4. Judgment against the Commissioners for breach of covenants in a lease cannot be collected out of their personal estate, but must be realized from funds in their hands as Commissioners. *Ib.*

COMMISSIONERS OF FENCES, see **FENCES**.

COMMISSIONERS OF PRIVATE WAYS AND WATER RIGHTS, see **WATER, WAY**.

COMMON LAW.

1. Is not in force in this Kingdom unless specially adopted. *Estate of Boardman*, 147; *Puukaiakea vs. Hiaa*, 484; *Awa vs. Horner*, 544.
2. Statutory remedy supersedes remedy at common law. *Herring vs. Gulick*, 57.

COMPLAINT, see **PLEADING**.

CONDITION, see **CONTRACT**, 1; **DEED**, 4, 9; **EJECTMENT**, 12.

CONSTITUTION, see **STATUTES**.

CONSTRUCTION.

1. Liberal construction should be given to Hawaiian words, claimed to be equivalent to technical English or Latin expressions. *Kekuke vs. Keliiaa*, 437.

See **CONTRACT**, **DEED**, **PROBATE LAW**, **STATUTE**, **WORDS**.

CONTEMPT.

Order adjudging party in contempt is not appealable. *Onomea vs. Austin*, 604.

CONTRACT.

1. In a planting contract, an agreement by plaintiff to plant 200 acres each year held to be a condition precedent; and plaintiff, failing to show he had planted 200 acres per year, held properly nonsuited. *Horner vs. Spreckels*, 650.
2. "37½ acres of cane and rattoons" held to mean 37½ acres of both together, not 37½ acres of each. *Chapin vs. Tisdale*, 52.
3. Agreement to lease certain rice lands held to be a lease. *Chulan vs. Princeville*, 84.
4. "Penalty and forfeiture of \$2,000" held to be liquidated damages. *Colby vs. Bailey*, 152.
5. Immoral contract: See *Kalua vs. Selig*, 656.

See ASSIGNMENT, 1; LANDLORD AND TENANT, 1; MASTER AND SERVANT.

CORPORATION.

1. A corporation, having accepted a charter, elected officers and adopted by-laws, held to be legally organized. *Onomea vs. Austin*, 555.
2. Holder of stock as security for debt held to have right to vote it. *Ib.*
3. Officers of a corporation held not disqualified from holding office in another corporation whose stock is pledged to the former. *Ib.*
4. Injunction, not *quo warranto*, is proper remedy against the manager of a sugar plantation who interferes after his removal. *Kilauea vs. Macfie*, 3.
5. Manager of sugar plantation is not an officer of the corporation owning it. *Ib.*
6. In absence of legislation forbidding it, a corporation can bring suit outside the jurisdiction where it was created. *Heeia vs. McKeague*, 101.
7. Foreign corporation suing in this Kingdom must set forth in the complaint that it has complied with the laws as to corporations. *Ib.*
8. Mandamus lies to compel Minister of Interior to present to Privy Council petition for charter of incorporation. *Grieve vs. Gulick*, 73.
9. A corporation held not estopped by acts of its manager as to a lease. *Akiona vs. Kohala Sugar Company*, 359.

COSTS.

1. Costs of new trial taxed to defendant, as it was through his laches the case was left to the jury. *Shipman vs. Nawahi*, 571.

2. Certain witness fees taxed as costs. *Shipman vs. Nawahi*, 587.
3. Final liability to pay costs is not determined till final judgment. *Kamalu vs. Lovell*, 181.
4. Party finally losing the case must pay costs, notwithstanding he prevailed in earlier stages. *Id.*
5. Defendant on his appeal reduced plaintiff's judgment one-fifth: held, plaintiff must pay costs. *Nakanelua vs. Kailianu*, 179.

See APPEAL, 18; ATTORNEY AT LAW, 1.

COURT. See CIRCUIT COURT, COURT AND JURY, JUDGE, JUDGMENT, JURISDICTION, SUPREME COURT.

COURT AND JURY.

A. DUTY OF COURT.

1. The Court may decline to give an instruction where the point is not raised by the evidence. *Robinson vs. Sresovich*, 618.
2. At close of plaintiff's case, verdict for defendant can only be directed when there is a total want of evidence to support plaintiff's claim. *Hawaiian Commercial Company vs. Horner*, 529.
3. The Court need not submit the case to the jury if there is no evidence on which they can find a verdict for the party who has burden of proof. *Kama'u vs. Lovell*, 62; *Kenway vs. Nolley*, 129.
4. Charge to jury, as to delivery of a lease, held proper. *Holi vs. Kvakanu*, 375.
5. Charge to jury as to possession of opium, held proper. *The King vs. Ah Sing*, 553.
6. There being evidence to justify the verdict, the Court cannot set it aside. *The King vs. Ah Sing*, 553; *The King vs. Keanu*, 173; *Kong Kee vs. Kahalekou*, 548; *Acheu vs. Sung Kwong Wo Co.*, 333; *Kapoohiwa vs. Kaluaaka*, 25; *Merrill vs. Jaeger*, 475; *The King vs. Ah Lee*, 545.
7. Question of delivery and acceptance, in sale of personal property, is for the Court, if there is no conflict of evidence: otherwise for the jury. *Ellis vs. Wilcox*, 236.
8. The Court is not required to put propositions to the jury in language used by counsel: nor to give again, in terms proposed by counsel, what has been already given. *Merrill vs. Jaeger*, 475.
9. In jury-waived case, finding of the Court on facts will be treated like verdict of jury: if there is evidence to support it, it cannot be disturbed. *Kong Kee vs. Kahalekou*, 548.
10. Although damages awarded may appear excessive, yet if they are within estimates given by witness, the verdict will not be disturbed. *Acheu vs. Sung Kwong Wo Co.*, 333.
11. Probable cause, in an action of false imprisonment, is not a question for the jury. *Alau vs. Parke*, 2.
12. Charge to jury, in an action for malicious prosecution, reviewed. *Phillip vs. Waller*, 609.

B. CONDUCT AND CONSTITUTION OF JURY.

13. Prosecuting witness, after trial, paid for dinner of some jurors at their request: held not to be such misconduct as would vitiate the verdict. *The King vs. Makaweo*, 64.
14. Hostility of a juror must be known to the party who alleges it, and made a ground of challenge before the jury are sworn. *Ib.*
15. Affidavit of a juror, as to remark made by another juror in the jury-room, is inadmissible. *The King vs. Keanu*, 173.
16. After verdict, a servant of plaintiff's treated some of the jury to a lunch, but plaintiff was not a party to it: held, no misconduct. *Holt vs. Brodie*, 662.
17. Parties of record control the constitution of the jury, as to whether it is native, foreign, or mixed. *Estate of Queen Emma*, 501.
18. Executor under will of a native being a foreigner, and contestant a native, a probate appeal is properly submitted to a mixed jury. *Ib.*

CRIMINAL LAW.

A. PRACTICE.

1. Action to recover statutory penalty for breach of city fire ordinance is not a criminal prosecution. *The King vs. Tong Wo*, 20.
2. Indictment presented by a *de facto* Attorney-General will not be quashed. *The King vs. Ah Lin*, 59.
3. Motion to quash is not proper subject of exceptions. *The King vs. Kekoa*, 621.
4. Motion to quash must be made before defendant has pleaded. *Ib.*
5. After both parties have rested, it is in the discretion of the Court to allow prosecution to put in evidence inadvertently omitted. *The King vs. Heleliili*, 16.
6. The fact that defendant was convicted on evidence of only one witness is no ground for a new trial. *The King vs. Ah Lee*, 545.
7. As to effect of a *nolle prosequi*, see *McCrosson vs. Cummings*, 391.
8. Requisites of a Search Warrant; see *See Hop vs. Chillingworth*, 537: *The King vs. Aho*, 565.
9. If there is evidence to justify the verdict, it cannot be set aside. See COURT AND JURY, 6.
10. An appeal in a criminal case being on points of law only, and the only error being in the judgment of the lower court: the case cannot be remitted for a legal judgment, but defendant must be discharged. *The King vs. Tai Wa*, 598.

B. ASSAULT WITH INTENT TO RAPE.

11. Absence of resistance, outcries and immediate complaint is not conclusive presumption of consent. *The King vs. Erickson*, 152.

C. CRUELTY TO ANIMALS.

12. Sec. 12, Chap. 51, Laws of 1884, does not authorize imprisonment for this offense. *The King vs. Tai Wa*, 598.
13. Conviction of cruelty to ten mules held not to be a bar to a subsequent conviction for cruelty to two horses. *The King vs. Tai Wa*, 598.

D. EMBEZZLEMENT.

14. Defendant, having failed to deliver in China money entrusted to him for that purpose in Honolulu, held guilty of embezzlement either in China or Honolulu. *The King vs. Chock Hoon*, 372.
15. Extradition granted, on requisition from California, for a person charged with embezzlement in that State. *Extradition of McCarthy*, 573.

E. FORGERY AND UTTERING.

16. Forged instrument need not be so made that if genuine it would be valid. *The King vs. Heleliilii*, 18.
17. Forged instrument must carry on its face the semblance of that of which it is a counterfeit. *The King vs. Mahukaliilii*, 96.
18. Guilty knowledge may be shown by evidence of statements of defendant as to other forged paper. *Ib.*

F. GAMING.

19. A lottery is a game. *The King vs. Ah Lee*, 545.

G. HOMICIDE.

20. There being evidence to support a conviction for murder, the Court declines to set the verdict aside. *The King vs. Keanu*, 173.
21. Self defense defined. *The King vs. Bridges*, 467.
22. It is proper to leave the whole case to the jury, with a statement of the law applicable. *Ib.*
23. Verdict of manslaughter in second degree held justified by evidence. *Ib.*

H. OBSTRUCTING OFFICER OF CUSTOMS.

24. Officer of Customs cannot, without a search warrant, open merchandise brought from a port of entry in an inter-island steamer and landed in warehouse at another port. *The King vs. Aho*, 585.
25. Officer with no search warrant held not to be in discharge of official duty: and defendant not guilty of obstructing him. *Ib.*

I. OPIUM.

26. Charge to jury, as to facts constituting possession, held proper. *The King vs. Ah Sing*, 553.
27. Requisites of Search Warrant, see *See Hop vs. Chillingworth*, 537.

CRUELTY TO ANIMALS, see CRIMINAL LAW, 12, 13.

CURRENCY, see *Opinion on the Currency*, 274.

CUSTOMS, see REVENUE LAWS.

DAMAGES.

1. A "penalty and forfeiture of \$2,000" held to be liquidated damages. *Colby vs. Bailey*, 152.
2. In an action for damage to plaintiff's carriage caused by reckless driving of defendant in his carriage: held no defense that both parties were returning late at night from an unlawful dance. *Reis vs. Wendel*, 140.
3. Plaintiff held not entitled to damages for injury to his feelings and reputation caused by the unauthorized publication by defendant of a letter of apology written by plaintiff to a third party. *Waterhouse vs. Spreckels*, 246.
4. In an action by a mortgagor to set aside sale made under a power in the mortgage, neither plaintiff nor purchasers at the sale can recover damages against the mortgagee on account of the sale. *Silva vs. Lopez*, 424.
5. A second telephone company is bound to construct its wires so as not to interfere with the wires of a company already established: and it is no defense to an action for damage caused by interference of wires, that ordinary care and skill was used in constructing lines of second company. *Bell Telephone vs. Mutual Telephone*, 456.

See NEW TRIAL, 7, 9; PLEADING, 3, 8.

DATES need not be proved with exactness. *Estate of Puukala*, 12.

DAYS, see MASTER AND SERVANT, 3; MORTGAGE, 7.

DE FACTO AND DE JURE, see *The King vs. Ah Lin*, 59.

DECLARATION, see PLEADING.

DEED.

1. Instrument held to be a deed, not a will. *Puukaiakea vs. Hiaa*, 484; *Kalihilihi vs. Kaina*, 330; *Keliikanakaole vs. Kuwaa*, 13; *Kahui vs. Lauki*, 296.
2. Instrument held to be a will, not a deed. *Ahlo vs. Mung Hui*, 632; *Estate of Kaulii*, 150.
3. Delivery and acceptance held to be proved. *Puukaiakea vs. Hiaa*, 484.
4. Deed creating an estate *in futuro* is not void. *Ib.*
5. Deed by old and feeble Hawaiians set aside for mistake. *Kukuinui vs. Naihe*, 462.
6. Bill to set aside deed dismissed, there being no evidence of inadequate consideration, incompetency of the grantor, or fraudulent representations. *Namomi vs. Ah Nui*, 441.
7. After lapse of time and possession, testimony of grantor held not sufficient to set aside deed. *Kumalu vs. Lovell*, 62.
8. Equitable doctrine of Laches may be applied to an ejectment suit depending on validity of a deed. *Ib.*

9. An estate on condition held not to be created by a deed in Hawaiian, which plaintiff claimed was conditioned on undertaking of grantee to support him. *Kekuke vs. Keliiia*, 437.
10. Liberal construction should be given to Hawaiian words in a deed that are claimed to be equivalent to technical English or Latin expressions. *Ib.*
11. A reservation for life of two houses, held to be a reservation of the lots on which they stand. *Keliikanakaole vs. Kawaa*, 134.
12. Plaintiff alleged that she was fraudulently induced to make a deed to grantees other than she intended: held that she, not the intended grantees, was the proper person to bring suit to cancel the deed. *Puuheana vs. Lio*, 202.
13. Bill by grantor, to set aside deed, for alleged fraud, dismissed. *Puuheana vs. Lio*, 204.
14. The Court will be exceedingly cautious about setting aside conveyances upon the ground of an ignorant misunderstanding. *Ib.*
15. Actual possession under unrecorded deed is constructive notice to subsequent purchaser whose deed is recorded. *Achi vs. Kauwa*, 298.
16. Court declines to set aside two deeds on the alleged ground of fraud practiced on the grantor, there being no proof of undue influence. *Howland vs. Naone*, 308.
17. Deed made by woman to her brother, just before her marriage, held to be in fraud of husband's rights. *Mutch vs. Holau*, 316.
18. Bill to set aside deed, for fraud practiced on the grantor, dismissed. *Puhi vs. Mahulua*, 659.

See BANKRUPTCY, 5, 7: EJECTMENT: FRAUD: MISTAKE.

DEFAULT.

Technical law of default does not apply to a divorce suit. *Mitchell vs. Mitchell*, 161.

See JUDGMENT.

DEFENDANT, see PARTIES, NEGLIGENCE.

DEFENSE, see DAMAGES, 2, 5.

DEMURRER, see EQUITY, 5: INJUNCTION, 3: PLEADING.

DENIZATION.

An alien holding Letters Patent of Denization need not take Oath of Allegiance in order to hold Government office. *Aliens and Denizens*, 167..

DESCENTS.

A third cousin cannot inherit under our statute. *Estate of B. P. Bishop*, 288.

DESERTING BOUND SERVICE, see MASTER AND SERVANT.

DEVISE, see PROBATE LAW.

DISCONTINUANCE, see MALICIOUS PROSECUTION, 1.

DISCRETION. See **APPEAL**, 4, 14, 15; **CRIMINAL LAW**, 5; **HUSBAND AND WIFE**, 11; **JUDGMENT**, 1, 2, 4; **MANDAMUS**, 2, 4, 5; **MINISTER OF INTERIOR**, 2; **SPECIFIC PERFORMANCE**, 2.

DISTRICT JUDGE, see **JUDGE**.

DIVORCE, see **HUSBAND AND WIFE**.

DOWER, see **HUSBAND AND WIFE: PROBATE LAW**.

DRAFT, see **NEGOTIABLE INSTRUMENT**.

EASEMENT, see **WATER: WAY**.

EJECTMENT.

1. Not merely a possessory action, but tries the title as well. It is enough to show that the persons in actual occupancy are holding under the adverse claimants. *Un Wong vs. Kan Chu*, 225.
2. Plaintiff claimed the whole land: verdict for undivided half held to be proper. *Ib.*
3. Effect of taking a deed by a grantee who claims adversely, considered. *Mahukaliilii vs. Hobron*, 104.
4. Slight proof of adverse possession held sufficient. *Ib.*
5. Actual possession under an unrecorded deed is constructive notice to a subsequent purchaser whose deed is recorded. *Achi vs. Kauwa*, 298.
6. Under plea of general issue defendant may set up any right under which he claims. *Kaimiola vs. Beni*, 294.
7. Neither a guardian nor his grantees will be allowed to set up possession or title adverse to the ward. *Lono vs. Phillips*, 357.
8. Action against several defendants claiming under different titles: held no misjoinder of parties. *Yee Tong Seu vs. Hee Ping*, 434.
9. Judgment for possession of land allowed to stand, if plaintiff files *remittitur* of damages. *Ib.*
10. Survivor of joint-disseisors becomes sole owner of the land. *Kauhikoa vs. Hobron*, 491.
11. Plaintiff need not show possession within twenty years, if he shows title and no adverse possession is proved. *Rose vs. Smith*, 377.
12. Defendant held estopped by an adjudication of pedigree in a former suit, notwithstanding failure of the clerk to enter judgment therein: it may be entered *nunc pro tunc*. *Ib.*
13. Plaintiff claimed that his deed was conditioned on the grantee supporting him: held, no estate on condition was created: and evidence of failure to support was properly excluded. *Kekuke vs. Kelliaa*, 437.
14. After lapse of time and possession, testimony of grantor held not sufficient to set aside his deed. *Kamalu vs. Lovell*, 62.

15. Equitable doctrine of Laches may be applied to an ejectment suit, depending on validity of a deed. *Ib.*
16. The rule in ejectment, that plaintiff may recover so much land as he is entitled to, does not apply to a bill in equity to cancel a royal patent. *Kalaeokekoi vs. Kahele*, 47.
17. Defendant alleged surprise at the evidence of his witness as to a lost deed: held that the evidence, even if true, would be very vague, and immaterial. *Ahlo vs. Mung Hui*, 632.
18. Grantee of heirs of one of several joint plaintiffs, in an action of ejectment, held estopped by judgment therein in a subsequent suit by such co-plaintiffs against him. *Holelua vs. Kapu*, 305.
19. Defendant, claiming by adverse possession, allowed to contradict evidence produced by plaintiff in rebuttal, that could not have been anticipated by the defense. *Kahui vs. Lauki*, 487.
20. Defendant bought land from a grantor who had no title, and built a house on the land: held, he could claim no equitable estoppel against plaintiff, who subsequently acquired title to the land. *Kela vs. Pahuilima*, 525.
21. Plaintiff's delay in claiming his rights held not to be laches, statute of limitations not having run. *Ib.*

See DEED: JOINT TENANCY: LANDLORD AND TENANT.

ELECTION.

1. Duties of Inspectors of Election defined. *The King vs. Kumuhoo*, 621.
2. Mandamus issued to compel Tax Collector to give a member of military company, exempt from personal taxes, a tax-receipt bearing the words "Qualified to vote." *Hipa vs. Luce*, 520.

EMBEZZLEMENT, see CRIMINAL LAW, 14, 15.

EMBLEMENTS, see LANDLORD AND TENANT, 1.

EMINENT DOMAIN.

A statute, providing adequate remedy for persons damaged by taking of land for public use, supersedes remedy at common law. *Her-ring vs. Gulick*, 57.

EQUITY.

1. Equity has jurisdiction to restrain a manager of a sugar plantation from interfering after his removal. *Kilauea vs. Macfie*, 3.
2. Equity follows Statute of Limitations. *Kalaeokekoi vs. Kahele*, 47.
3. Where a bill to set aside a Royal Patent is dismissed, plaintiff cannot recover, as in ejectment, so much land as he is entitled to. *Ib.*
4. Equity will not relieve in the case of a bargain merely improvident. *Namomi vs. Ah Niu*, 441.
5. Demurrer sustained to bill by mortgagee for injunction, on ground

that plaintiff has an adequate remedy at law. *Nott vs. Burgen*, 420.

See DEED: EJECTMENT: ESTOPPEL: FRAUD: HUSBAND AND WIFE: INJUNCTION: JOINT TENANCY: LACHES: LANDLORD AND TENANT: MISTAKE: MORTGAGE: PARTITION: PARTIES: PLEADING: SALE: SPECIFIC PERFORMANCE: TRUST.

ERROR, see JUDGMENT: WRIT OF ERROR.

ESTATES OF DECEASED PERSONS, see PROBATE LAW.

ESTOPPEL.

1. Agreement between defendant and B, held not to estop defendant from denying liability to plaintiff for goods sold to B. *Tinker vs. Graham*, 593.
2. Plaintiff in ejectment held not to be estopped by having allowed defendant to build a house on the land, defendant having no title. *Kela vs. Pahuilima*, 525.
3. Defendant, owner of land, allowed plaintiff to lend money on a mortgage made by one in possession of the land under an apparently good title: held, plaintiff could recover amount of mortgage from defendant. *Armstrong vs. Kapohaku*, 185.
4. Grantee of heirs of one of several joint-plaintiffs in ejectment, held estopped by judgment therein, in a subsequent suit by such co-plaintiffs against him. *Holelua vs. Kapu*, 305.
5. Defendant held estopped by adjudication of pedigree in a former suit, notwithstanding the clerk failed to enter judgment on verdict therein: judgment may now be entered *nunc pro tunc*. *Rose vs. Smith*, 377: *Kaawihi vs. Noa*, 381: *Kaawihi vs. Rose*, 382.
6. Trustees under a will having delegated their authority to decedent's widow, held liable for her debts incurred for support of children. *Stillman vs. Davies*, 494.
7. A corporation held not estopped by acts of its manager and agent in regard to a lease. *Akiona vs. Kohala Sugar Co.*, 359.
8. Commissioner of Boundaries having taken testimony as to fishing rights, but having refused to award the rights; owner of adjoining land held not estopped from disputing boundaries of those fishing rights, in another suit. *Akeni vs. Wong Ka Mau*, 91.
9. L. planted land on shares, by agreement with widow of decedent: land was sold to pay decedent's debts: held, L. was not estopped to claim his share of the crop from the purchaser of the land, and the widow was not estopped to claim her dower in the proceeds. *Luha vs. Fernandez*, 388.

EVIDENCE.

1. It is discretionary with the Court to allow the prosecution, after both sides have closed, to put in evidence inadvertently omitted. *The King vs. Heletilili*, 16.

2. Evidence being conflicting, Court declines to disturb verdict. See COURT AND JURY, 6.
 3. A foreign law must be proved like any other fact. *Board of Immigration vs. Estrella*, 211.
 4. In ejectment, plaintiff in rebuttal put in evidence to rebut adverse possession of defendants: defendants were then allowed to contradict this rebuttal: held, no error. *Kahui vs. Lauki*, 487.
 5. Receipts given by an alleged agent held admissible as evidence of agency. *Robinson vs. Sresovich*, 618.
 6. Evidence as to certain keys found on plaintiff, and as to defendant's conversations with police officers while making the charge, admitted as part of *res gestae* in an action for malicious prosecution. *Phillip vs. Waller*, 609.
- See ARBITRATION: BOUNDARIES: COURT AND JURY: CRIMINAL LAW: EJECTMENT: NEW TRIAL: PLEADING: PROBATE LAW.

EXCEPTION.

1. Exceptions can be taken from order refusing new trial, and there is no time limited within which the bill of exceptions must be presented. *Ah Chu vs. Sung Kwong Wo Co.*, 291.
2. Bill of exceptions, referring to Judge's notes as evidence, is not improper. *Ib.*

See APPEAL: CRIMINAL LAW, 3; NEW TRIAL.

EXECUTOR, see PROBATE LAW.

EXTRADITION.

1. Extradition granted, on requisition of Governor of California and request of U. S. Minister Resident in this Kingdom, notwithstanding that embezzlement is not an offense named in the Treaty. *In re McCarthy*, 573.
2. The Government has a right, independent of any treaty, to surrender a fugitive from justice of a foreign State. *Ib.*

FALSE IMPRISONMENT, see MALICIOUS PROSECUTION.

FALSE REPRESENTATIONS, see FRAUD.

FENCES.

A party, whose rights are to be passed upon at any hearing before Commissioners of Fences, must have notice to attend. *Gonveia vs. Loka*, 286.

FIRE.

1. Printed Circular, not specifying actual breach of fire ordinance, is not a compliance with statute requiring written notice to be given to a person violating an ordinance. *Maguire vs. Tong Wo*, 41.
2. Action to recover statutory penalty for breach of fire ordinance is not a criminal prosecution. *The King vs. Tong Wo*, 20.

3. Minister of Interior, having charge of city water supply, is not liable at suit of a private citizen for damage caused by insufficient water-supply at a fire. *Way vs. Gulick*, 70.

FISHERY. Rights considered and passed upon. *Akani vs. Wong Ka Mau*, 91; *Shipman vs. Nawahi*, 571.

FOREIGN LAW must be proved like any other fact. *Board of Immigration vs. Estrella*, 211.

FORGERY, see **CRIMINAL LAW**, 16, 17, 18.

FORMS, see **PLEADING**.

FRAUD.

1. Bill to set aside deed for fraud dismissed. *Puuheana vs. Lio*, 204.
2. The Court will be very cautious about setting aside conveyances on the ground of ignorant mistake. *Ib.*
3. A sale of shares of stock set aside for false representations of the seller, upon which the buyer acted, although he might, by diligent inquiry, have ascertained their falsity. *Wilcox vs. Ellis*, 335.
4. Sale of a sugar plantation, at an exaggerated price, to a person of impaired mind, set aside. *McKeague vs. Kennedy*, 347.
5. Deed made by a woman to her brother, just before her marriage, held to be in fraud of the husband's rights. *Mutch vs. Holau*, 316.
6. The Court declines to set aside two deeds for alleged fraud practiced on the grantor, there being no proof of undue influence. *Howland vs. Naone*, 308.
7. Mere suspicion is not sufficient ground to establish fraud. *Ib.*
8. Bill to set aside deed dismissed, there being no proof of inadequacy of consideration or fraudulent representations. *Namomi vs. Ah Niu*, 441.
9. Equity will not relieve in the case of a bargain simply improvident. *Ib.*
10. Conveyance made in May, 1884, by a party declared bankrupt in February, 1885, set aside as in fraud of creditors. *Parke vs. Lau Ng*, 515.
11. Bill to set aside deed, for fraud and undue influence practiced on the grantor when in a condition of mental unsoundness, dismissed. *Puhi vs. Mahulua*, 659.
12. Transfer by a partner to the firm book-keeper, prior to bankruptcy, held in fraud of creditors. *Hackfeld vs. Ing Choi*, 136.
13. In an action to cancel a power of attorney for fraud practiced by the donee of the power on the donors: held that no fraud was shown, and the donors must abide by their contract. *Kaopua vs. Keelikolani*, 675.
14. Court cannot conclude that people do not understand consequences of their own acts, and relieve them from results of their

own ignorance and stupidity, when, by so doing, an injury would be inflicted on third parties. *Ib.*

See MISTAKE.

FRAUDS, STATUTE OF, see STATUTE OF FRAUDS.

GAMING, see CRIMINAL LAW, 19.

GARNISHEE.

1. Plaintiff held entitled to amount paid into Court by garnishee, as against assignees in Bankruptcy of defendant. *West vs. Kerr*, 445.
2. Petition for garnishee process must be in writing. *Frag vs. Adams*, 664.
3. Judgment by default was entered in a term-case in vacation: the garnishee paid into Court funds in his hands before opening of the term: proceedings held regular. *Ashford vs. Titcomb*, 489.
4. Assignee for benefit of creditors cannot be garnisheed in suit against the debtor by a creditor not included in the assignment. *Lam Yip vs. Ching Sing*, 589.

GATE, see WAY, 5.

GIFT. A deposit in savings bank by a father, to account of a son, but payable to himself, is an incomplete gift *inter vivos*, void for want of delivery. *Brown vs. Bishop & Co.*, 54.

GOVERNMENT, see *Aliens and Denizens*, 187: *Segregation of Lepers*, 182: MANDAMUS: MINISTER OF INTERIOR.

GOVERNMENT BOND, see *Castle vs. Kapena*, 27.

GOVERNMENT OFFICE, see *Aliens and Denizens*, 187.

GRANT. See EJECTMENT: JOINT TENANCY, 2: FISHERY.

GUARDIAN AD LITEM, see PLEADING.

GUARDIAN AND WARD.

Neither guardian nor his grantees will be allowed to set up possession or title in land adverse to the ward. *Lono vs. Phillips*, 357.

See PROBATE LAW.

HAWAIIAN WORDS, see DEED, 9, 10: WORDS.

HIGHWAY, see WAY.

HUSBAND AND WIFE.

A. GENERAL.

1. Necessaries do not include fee of attorney for defending wife in criminal suit for desertion brought by husband. *Kekoa vs. Borden*, 23.
2. Trust, to wife's separate use, held to vest in executors by terms of will. *Estate of Boardman*, 146.
3. Deed made by a woman to her brother, just before her marriage,

set aside as in fraud of the husband's rights. *Mutch vs. Holan*, 316.

4. Marriage does not vest wife's choses in action in the husband, unless he takes steps to reduce them to possession during coverture. *Riemenschneider vs. Kalaehao*, 550.
5. Carriage and horses bought by the wife with proceeds of sale of her land, held to belong to her husband. *Ib.*
6. In a conveyance to husband and wife, the entire estate vests in the husband on wife's death. *Wailehua vs. Lio*, 519.
7. Lease purporting to be by husband and wife, but executed by husband only, held to be ratified by the wife by receiving rent after husband's death. *Kenway vs. Notley*, 123.
8. In an action for necessities furnished to the wife, while separated from her husband on account of his adultery, the fact of her subsequent adultery is no defense, unless the wife's adultery is notorious and known to the person supplying the necessities. *Luka vs. Poohina*, 695.

See LANDLORD AND TENANT, 1: PROBATE LAW, 11, 13, 16.

B. DIVORCE AND SEPARATION.

9. Law of default does not apply to divorce suit: if defendant has defense, it is duty of Court to hear it. *Mitchell vs. Mitchell*, 161.
10. Statutory attorneys' fees will not be taxed in suit for divorce or separation. *Gertz vs. Gertz*, 175.
11. Allowance of attorneys' fees is in discretion of the Court. *Kekoa vs. Borden*, 24.
12. Alimony does not include fee of attorney for defending wife in criminal suit for desertion, brought by the husband. *Ib.*
13. Voluntary gifts and assistance to the wife from her family are not proof of the husband's failure to support her. *Coleman vs. Coleman*, 260.
14. "Cruelty" defined, and held not proven. *Ib.*

ILI, see BOUNDARIES: FISHERY.

ILLEGALITY, see DEFENSES.

IMMIGRATION, see MASTER AND SERVANT.

INDICTMENT, see CRIMINAL LAW.

INFANCY, see GUARDIAN: PARENT: PROBATE LAW.

INJUNCTION.

1. Injunction, not mandamus, is the remedy to prevent a public officer from doing a contemplated illegal act. *Castle vs. Kapena*, 27.
2. Injunction, not quo warranto, is the remedy against manager of a plantation who interferes after his removal. *Kilauea vs. Macfie*, 3.
3. Plaintiff filed bill to restrain defendant from opening a water

way, but alleged that plaintiff had closed it up : held demurrable, as there was no averment that defendant threatened to re-open it. *Lopez vs. Acheu*, 607.

4. Injunction granted against defendants, who had transferred stock of a corporation as security, and lost their right to redeem, restraining them from interfering with the management of the corporation. *Onomea vs. Austin*, 555.

INSOLVENCY, see BANKRUPTCY.

INSURANCE, see TAX, 4.

JOINDER, see PARTIES.

JOINT STOCK COMPANY, see CORPORATION.

JOINT TENANCY AND TENANCY IN COMMON.

1. There being no feudal tenures in this Kingdom, reason for common law rule of joint-tenancy has no existence here. *Awa vs. Horner*, 548.
2. Grant by royal patent to two persons and their heirs held to create a tenancy in common. *Ib.*
3. In a conveyance to husband and wife, entire estate vests in husband on wife's death. *Wailehua vs. Lio*, 519; *Kenway vs. Notley*, 124.
4. Title of tenants in common must be at rest between them, or partition cannot be decreed. *Wailehua vs. Lio*, 519.
5. Survivor of joint disseisors becomes sole owner. *Kauhikoa vs. Hobron*, 491.
6. Plaintiff, by an assignment of an interest in a contract, held to become a joint contractor with his assignor, not a tenant in common. *Horner vs. Spreckels*, 430.
7. A widow in possession of her deceased husband's land, held to be a tenant in common with the heirs and with purchasers at a sale of the land to pay decedents' debts. *Luha vs. Holt*, 182.
8. The widow having agreed that plaintiff should plant the land on shares : held, that plaintiff was a tenant in common with the widow, and entitled to harvest the crop after the sale of the land. *Ib.*

JUDGE. Alleged malfeasance of District Judge reviewed. *In re Kahulu*, 283 : *In re Kakina*, 669.

See COURT.

JUDGMENT.

1. No appeal from judgment by default. *Luce vs. Chin Wa*, 629.
2. A Court may in its discretion allow a re-argument : and may, in consequence thereof, correct manifest errors and mistakes in a decision rendered. *Mahukaliilii vs. Hobron*, 106.
3. Where clerk fails to enter judgment on verdict, the Court will

order it entered *nunc pro tunc*, when the defect is noticed. *Rose vs. Smith*, 377.

4. Judgment by default was entered in vacation, in a term-case: held regular: and all arguments for opening default must be addressed to the discretion of the presiding Judge at the term. *Ashford vs. Titcomb*, 489.

See COSTS: ESTOPPEL, 4, 5.

JUDICIAL NOTICE.

The Court will take judicial notice of condition of communities on the Islands, and their modes of doing business. *The King vs. Heleliilii*, 18.

JURISDICTION.

1. Of Circuit Courts on appeal. *The King vs. Aiona*, 142; *Board of Immigration vs. Sousa*, 588.
2. Of Probate Courts as to revocation of probate. *Estate of Kauai*, 150.
3. Waiver by counsel held to give the Court jurisdiction of persons, it already having jurisdiction of subject-matter. *Coleman vs. Coleman*, 300.

See ADMIRALTY: APPEAL: CIRCUIT COURT: CRIMINAL LAW, 14, 15: EQUITY: MANDAMUS: PARTIES: PROBATE LAW: SUPREME COURT: WATER.

JURY, see COURT AND JURY.

KULEANA, see LAND COMMISSION AWARD.

LABOR CONTRACT, see MASTER AND SERVANT.

LACHES.

1. Plaintiff's delay in claiming title to land held not to be laches, statute of limitations not having run. *Kela vs. Pahuilima*, 525.
2. Doctrine of Laches may be applied to ejectment suit depending on validity of deed. *Kamalu vs. Lovell*, 62.
3. Poverty is not excuse for laches. *Kalaeokekoi vs. Kahele*, 47.
4. Failure to assert rights for period up to or less than that prescribed by statute of limitations, is laches. *Ib.*

See COSTS, 1: SPECIFIC PERFORMANCE, 3: STATUTE OF LIMITATIONS.

LAND COMMISSION AWARD.

1. Proceedings before the Land Commission cannot now be re-examined. *Kaai vs. Mahuka*, 354.
2. Award 721, to Mahuka, though headed "Mahuka and Kaai," creates no trust in Mahuka for Kaai. *Ib.*

See BOUNDARY: EJECTMENT: FISHERY: JOINT TENANCY: ROYAL PATENT: WATER: WAY.

LAND OFFICE, PRACTICE IN, see *Kalaeokekoi vs. Kahele*, 47.

LAND, TITLE TO, see BOUNDARY : DEED : EJECTMENT :
EQUITY : JOINT TENANCY : LANDLORD AND TENANT :
WAY.

LANDLORD AND TENANT.

1. Widow agreed that plaintiff should plant land on shares ; before maturity of crop, the land was sold to pay debts of deceased husband : held, plaintiff could harvest crop, but could not recover damages of widow for breach of covenant. *Luka vs. Holt*, 182.
2. Tenant, who has right to remove fixtures, must do so before he quits possession. *Akiona vs. Kohala Sugar Company*, 359.
3. Tenant held to have surrendered right, under the lease, to be paid for house built by him. *Ib.*
4. Landlord, a corporation, held not estopped by acts of its manager. *Ib.*
5. Lease was dated 26th August : held, there was no evidence of waiver of right to collect rent on 26th of each month. *Tregloan vs. Bertelmann*, 600.
6. Evidence fails to show surrender of term by lessee or release by lessor. *Ib.*
7. Lessor, to oust tenant for non-payment of rent, must pursue the statutory remedy ; if he takes forcible possession, he is liable as bailee for goods of tenant. *Kong Kee vs. Kahalekou*, 548.
8. Statute as to summary proceedings applies only where relation of landlord and tenant exists. *Robello vs. Wong Quing*, 98.
9. Lease was made of mortgaged land, to be annulled in case of foreclosure : held, that vendee at foreclosure sale could bring summary proceedings against lessee. *Ib.*
10. Lease need not be in duplicate. *Holi vs. Koakanu*, 375.
11. Facts held to constitute delivery of lease. *Ib.*
12. Charge to jury, as to delivery, held proper. *Ib.*
13. Agreement for leasing rice land held to be a lease. *Chulan vs. Princeville*, 84.
14. Defendants held to be entitled to interest from date of writ. *Ib.*
15. Lease, executed by husband only, held to have been ratified by wife accepting rent after husband's death. *Kenway vs. Notley*, 123.
16. Voluntary bankruptcy of lessee is not breach of covenant not to assign without lessor's consent. *Peacock vs. Lovejoy*, 231.
17. Receipt of rent by lessor, after breach of covenants known to him, is waiver of breach. *Bishop vs. Commissioners*, 242.
18. Assignee of lessee may sue lessor for breach of covenant of quiet enjoyment. *Ib.*
19. Lease as partnership assets, considered. *Un Wong vs. Kan Chu*, 225.

See EJECTMENT, 8, 9.

LAW, see FOREIGN LAW : STATUTES.

LEASE, see LANDLORD AND TENANT.

LEPROSY, see *Segregation of Lepers*, 162.

LETTER, Rights of Property in. *Waterhouse vs. Spreckels*, 246.

LETTERS OF DENIZATION, see DENIZATION.

LIBEL.

An action cannot be sustained at law, either for libel or damage, to recover for injury to plaintiff caused by unauthorized re-publication by defendant of a letter printed and published by plaintiff twenty years previously. *Waterhouse vs. Spreckels*, 246.

LIMITATIONS, see STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES, see DAMAGES.

LOST INSTRUMENT, see EJECTMENT, 17: PROBATE LAW, 1, 2.

MAHELE, see BOUNDARY.

MALFEASANCE, see JUDGE.

MALICIOUS PROSECUTION.

1. It is not necessary to show that the criminal charge, on which the action is based, resulted in an acquittal: it is enough if it was discontinued by the prosecution. *McCrosson vs. Cummings*, 391.
2. Facts sufficient to induce belief in guilt of accused must have been known to defendant before he made the charge, in order to base probable cause upon them. *Phillip vs. Waller*, 609.
3. Probable cause defined. *Ib.*
4. Probable cause is not a question for the jury. *Alau vs. Parke*, 2.

MALPRACTICE, see ATTORNEY-AT-LAW, 3.

MANDAMUS.

1. Citizens and tax-payers may bring mandamus against a public officer. *Castle vs. Kapena*, 27.
2. Mandamus lies against a Cabinet Minister to compel performance of purely Ministerial duties. *Ib.*
3. Mandamus is not the proper remedy to prevent a public officer from doing a contemplated illegal act. *Ib.*
4. Mandamus lies to compel the Minister of Interior to present to the King in Privy Council a petition for a charter of incorporation. *Grieve vs. Gulick*, 73.
5. Mandamus issued to compel tax-collector to give a member of military company, exempt from personal taxes, a tax receipt with words "qualified to vote." *Hipa vs. Luce*, 520.

See MINISTER OF INTERIOR.

MANSLAUGHTER, see **CRIMINAL LAW**, 21, 22, 23.

MARRIED WOMAN, see **BREACH OF PROMISE: HUSBAND AND WIFE: PROBATE LAW**, 11, 13, 14, 15, 16, 17.

MARSHAL OF THE KINGDOM, see **TRESPASS**.

MASTER AND SERVANT.

A. GENERAL.

1. Subsequent seduction of a servant by her master would not bar her right to wages for prior proper domestic service: but here the original contract was clearly for plaintiff's person: verdict for plaintiff set aside. *Kalua vs. Selig*, 656.
2. Servant claimed wages under an alleged continuing trust in the master in her favor: held, as the evidence failed to prove a trust, statute of limitations ran against all of the claim prior to the last six years. *Kamihana vs. Glade*, 497.

B. LABOR CONTRACTS.

3. Contract for three years held to mean calendar years, in spite of wages being paid for each month of 28 days. *Rickard vs. Couto*, 507.
4. Laborer cannot be compelled to make up lost time, except by adjudication of a Court. *Ib.*
5. Contract made in a foreign country, to be executed here, need not be acknowledged. *Board of Immigration vs. Estrella*, 211.
6. Foreign law must be proved. *Ib.*
7. Contract may be cancelled for default of agents and overseers of the master. *Ib.*
8. An overseer is a "master" within the law prescribing a penalty for cruelty of master to servant. *Ib.*
9. Alleged malfeasance of a District Judge, in a case between master and servant, considered. *In re Kakina*, 689.

MINISTER OF FINANCE, see **MANDAMUS**, 1, 2, 3.

MINISTER OF INTERIOR.

1. His duties and responsibilities are similar to those that pertain to municipal corporations elsewhere. *Way vs. Gulick*, 70.
2. Supplying water rests in his discretion, and he is not liable to a private citizen damaged by lack of water supply at a fire. *Ib.*
3. Mandamus lies to compel him to present to Privy Council a petition for charter of incorporation. *Grieve vs. Gulick*, 73.

MINOR, see **GUARDIAN AND WARD: PARENT AND CHILD: PROBATE LAW**, 14.

MISTAKE.

1. Trust deed, without power of revocation, held not revocable by maker on ground of mistake: the mistake, if any, being of law. *Afong vs. Afong*, 191.

2. Deed by old and feeble Hawaiians set aside: it appearing that they intended to reserve a life interest, and executed deed under mistake of its legal effect. *Kukuinui vs. Naihe*, 462.

See FRAUD: JUDGMENT, 2.

MORTGAGE.

1. A planter mortgaged to plaintiff the sugar to be produced from certain land: the contract between the planter and mill-owner was that advances by the mill-owner were to be paid first from proceeds of crop: the mill-owner having no money due the planter, held, that the mortgagor had no claim against the mill-owner for proceeds of sugar. *Sing Chong vs. Hutchinson*, 452.
2. Mortgagee can recover amount of mortgage from the actual owner of land, who stood by and allowed mortgagee to take the mortgage from mortgagor, who apparently had a good title, the money having been spent in improvements on the land. *Armstrong vs. Kapohaku*, 185.
3. Foreclosure decreed of mortgage on a sugar plantation: and the mortgage held to cover advances for carrying on the plantation. *Grinbaum vs. Heeia*, 397.
4. Mortgagor failed to appropriate payments on the mortgage: held, mortgagee was not bound to apply them to interest, but could appropriate them to an unsecured debt for advances. *Grinbaum vs. Heeia*, 405.
5. Vendor of a railway, included in a mortgage by vendee to a third party, held to have no right to remove the railway under the claim that the sale was conditional. *Fowler vs. Heeia*, 410.
6. In foreclosure, demand for interest is not equivalent to entry. *Silva vs. Lopez*, 262.
7. Where mortgage prescribed three weeks' notice to be published of time and place of sale on foreclosure, a sale on the twentieth day after first publication is invalid. *Ib.*
8. A sale in town of cattle running in the country, where bidders could not see the property, held to be in violation of mortgagee's duty to sell to best advantage. *Ib.*
9. A sale on foreclosure having been set aside for irregularity: held, that neither mortgagor nor purchasers at sale could recover, in action to set aside sale, consequential damages against the mortgagee. *Silva vs. Lopez*, 424.
10. In a bill to set aside sale under power in a mortgage, the mortgagor offered to pay the mortgagee any balance due: held, this gave a Court of Equity power to decree that mortgagor pay the deficiency on the mortgage after a subsequent sale. *Silva vs. Lopez*, 594.
11. Vendee at foreclosure sale may bring action for summary possession against lessee of the land, who holds under a lease conditioned to be annulled on a foreclosure sale. *Robello vs. Wong Quing*, 98.

12. If there is no express stipulation to the contrary, right of possession of mortgaged chattels vests in the mortgagee immediately on execution of the mortgage: only the right to redeem passes to the assignees in bankruptcy of the mortgagor. *Nott vs. Burgess*, 420.
13. Demurrer sustained to a bill by a mortgagee for an injunction against defendant disposing of the mortgaged property, on the ground that plaintiff has an adequate remedy at law. *Ib.*
14. Transfer of shares of stock as security held not to be a mortgage or pledge, but to give the holder power to vote the stock. *Onomea vs. Austin*, 555.

MUNICIPAL CORPORATION, see MINISTER OF INTERIOR.

MURDER, see CRIMINAL LAW, 20, 21, 22, 23.

NECESSARIES, see HUSBAND AND WIFE: PARENT AND CHILD.

NEGLIGENCE.

Illegal act of plaintiff held to be no excuse for negligence of defendant. *Reis vs. Wendel*, 140.

See LACHES.

NEGOTIABLE INSTRUMENTS.

A check, informally and awkwardly drawn, held to be valid, when coupled with the assurance of the endorser that it was genuine. *The King vs. Heleliili*, 18.

See *Brown vs. Bishop & Co.*, 54.

NEW TRIAL.

1. The fact that defendant was convicted on evidence of one witness is no ground for granting a new trial. *The King vs. Ah Lee*, 545.
2. Affidavit in support of motion for new trial should show that evidence is newly discovered, and that due diligence was used. *Malani vs. Puhi*, 504.
3. Affidavits may be received after ten days from verdict, notwithstanding Rule VIII. *Ib.*
4. Affidavit of an attorney held improper. *Ib.*
5. Affidavit not properly entitled ought not to be read. *Ib.*
6. Under Rule VIII., on exceptions from order denying or granting motion for new trial, bond for further costs must be filed within ten days. *Nakuaimano vs. Ahoi*, 591.
7. New trial ordered, unless plaintiff files remittitur of damages. *Riemenschneider vs. Kalaehao*, 550.
8. The Court will not grant a new trial in order that new counsel may present a case with more exactitude, no exceptions, covering the points, having been taken at the trial. *Acheu vs. Sung Kwong Wo Co.*, 333.

9. Although damages may appear excessive, yet if they are within estimates given by witnesses, the verdict will not be set aside. *Ib.*
10. The verdict will not be set aside if there is evidence to support it. *The King vs. Ah Sing*, 553; *The King vs. Keanu*, 173; *Kong Kee vs. Kahalekou*, 548; *Acheu vs. Sung Kwong Wo Co.*, 333; *Kapoo-hiwa vs. Kaluaha*, 25; *Merrill vs. Jaeger*, 475; *The King vs. Ah Lee*, 545.
11. New trial was claimed, in ejectment, on alleged surprise at evidence: held, properly refused, for even if the evidence were as claimed, it would be vague and of no effect. *Ahlo vs. Mung Hui*, 632.
12. Plaintiff alleged surprise at defendant, in ejectment, setting up claim by inheritance, he having previously told plaintiff's attorney he claimed by adverse possession: new trial refused. *Kaimiola vs. Beni*, 294.
13. Evidence of a friend of plaintiff, who sat with him at the trial, cannot be called *newly discovered*. *Ib.*
14. Costs of new trial taxed to defendant, as it was through his laches that the case was left to the jury. *Shipman vs. Nawahi*, 571.
15. If new trial is ordered, the party finally losing the case must pay all costs, notwithstanding he prevailed in the first trial. *Kamalu vs. Lovell*, 181.
16. After verdict for plaintiff, a servant of plaintiff provided a lunch for some of the jurors: plaintiff was not a party to it: held, no reason for granting a new trial. *Holt vs. Brodie*, 662.
17. Prosecuting witness, after trial, paid for dinner of some jurors at their request: held not to be such misconduct as would vitiate verdict. *The King vs. Makaweo*, 64.

See APPEAL: COSTS: EXCEPTIONS:

NEWLY-DISCOVERED EVIDENCE, see NEW TRIAL, 13.

NOLLE PROSEQUI, see CRIMINAL LAW, 7.

NONSUIT, see CONTRACT, 1: JUDGMENT.

NOTE, see NEGOTIABLE INSTRUMENT.

NOTICE.

1. Actual possession of land by a party under an unrecorded deed is constructive notice to a subsequent purchaser. *Achi vs. Kauwa*, 298.
2. Where a statute prescribes written notice to be given of a violation, a printed circular warning against violations, but not alleging any specific breach, is not a proper notice. *Maguire vs. Tong Wo*, 41.

See JUDICIAL NOTICE: MORTGAGE, 7.

NUISANCE.

1. Smoke and soot from furnace of ice factory held to be a nuisance to owner of adjoining premises. *Fernandez vs. People's Ice Co.*, 232.
2. It is no defense that the ice business is lawful, or carried on in reasonable manner, or is a public benefit, if the results are in fact a nuisance. *Ib.*

OATH, see ALIEN: PLEADING, 2.

OFFICER, see COMMISSIONERS OF CROWN LANDS, 3: CORPORATION, 3, 4, 5, 9: CRIMINAL LAW, 2, 24, 25: MAN-DAMUS.

OPIUM, see CRIMINAL LAW, 26, 27.

PAR VALUE, see *Castle vs. Kapena*, 27.

PARENT AND CHILD.

Defendant gave his infant child to plaintiff to bring up, and afterwards took the child back: held, plaintiff was in *loco parentis*, and cannot recover for necessities furnished to the child, there being no contract by defendant to pay for them. *Mokuhia vs. McCandless*, 370.

PARTIES.

1. Plaintiff alleged that she was induced by fraud to make a deed to different grantees from those she intended: held she, not the intended grantees, is proper person to bring suit to set deed aside. *Puuheana vs. Lio*, 202.
2. One party to a contract having assigned to his brother, who brought suit: held, that by the assignment the brothers became joint contractors, not tenants in common: and both brothers should have been joined as co-plaintiffs. *Horner vs. Spreckels*, 430.

See BANKRUPTCY, 3: EJECTMENT, 1, 8.

PARTITION, see JOINT TENANCY, 4.

PARTNERSHIP.

1. Surviving partner holds partnership property to pay firm debts, after which share of deceased partner goes to his heirs or administrators. *Un Wong vs. Kan Chu*, 225.
2. Transfer by a partner to the firm book-keeper having been held to be in fraud of creditors: held, that the book-keeper, having paid certain debts for the vendor, could recover the amount by subrogation from the vendors' assignees in bankruptcy, before payment of partnership debts. *Hackfeld vs. Ing Choi*, 138.

See *Sing Chong vs. Hutchinson*, 454.

PATENT, see ROYAL PATENT.

PAYMENT.

Mortgagor having failed to appropriate payments on the mortgage: held, the mortgagee need not apply them to interest, but could appropriate them to an unsecured debt for advances. *Grinbaum vs. Heeia Sugar Company*, 405.

PENALTY.

Action for penalty is civil action in form and substance. *The King vs. Tong Wo*, 20; *Maguire vs. Tong Wo*, 41.

See DAMAGES, 1.

PERSONAL PROPERTY, see SALE.

PLAINTIFF, see PARTIES.

PLEADING.

1. Forms of complaints in the Code are only guides: departures from them are not fatal. *Heeia vs. McKeague*, 101.
2. Authority of agent or attorney to make affidavit to complaint is not proper subject of demurrer. *Ib.*
3. What damages can be recovered under prayer for general relief in equity. *Silva vs. Lopez*, 424.
4. Demurrer to bill in equity sustained because plaintiff had adequate remedy at law. *Nott vs. Burgess*, 420.
5. Bill in equity held demurrable because plaintiff asked that defendant be restrained from opening a water-way, but alleged that plaintiff had closed the same, and there was no averment that defendant threatened to re-open it. *Lopez vs. Acheu*, 607.
6. Plaintiff alleged that defendant agreed to supply him with water sufficient, in defendant's opinion, for a certain purpose: held, plaintiff could not show bad faith of defendant. *Horner vs. Spreckels*, 650.
7. Complaint for breach of promise held not demurrable because father failed to obtain leave of court to sue for his daughter: and held to sufficiently allege a promise. *Dias vs. Gilliland*, 540.
8. An action for breach of promise, entitled "Damages," held to be assumpsit, and allegation of damage treated as surplusage. *Ib.*
9. In bill to set aside deed for fraud, evidence need not be pleaded: allegation that plaintiff has cause to suspect, coupled with averment of fraud, is enough. *Puuheana vs. Lio*, 202.
10. It is too late to dismiss a case, on appeal, for defect in the summons, when no notice of defect was taken in the police court. *Robello vs. Wong Quing*, 98.
11. Allegations in an answer, as to want of notice by a *bona fide* grantee in a deed, held sufficient. *Puuheana vs. Lio*, 210.

PLEDGE, see MORTGAGE, 14.

POLICE POWER, see *Segregation of Lepers*, 162.

POWER OF ATTORNEY, see ATTORNEY IN FACT.

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PRESUMPTION, see **ARBITRATION AND AWARD, 5.**

PRINCIPAL AND AGENT, see **AGENCY.**

PRIVATE WAY, see **WAY.**

PRIVY COUNCIL.

1. Construction placed upon a statute by the Privy Council is entitled to weight, as being contemporaneous interpretation by a department of the Executive. *Bell Telephone vs. Mutual Telephone*, 456.

See **MINISTER OF INTERIOR, 3.**

PROBATE LAW.

1. In order to sustain a lost will the jury must be satisfied, from preponderance of evidence, that it was made and duly executed, and that its contents were as alleged. *Estate of Puhaiakala*, 10.
2. A lost will may be proved by competent secondary evidence. *Ib.*
3. Dates need not be proved with exactness. *Ib.*
4. Neglect of executor to present will for probate during the minority of a devisee should not operate unfavorably to the minor. *Ib.*
5. Instrument held to be a deed, not a will. *Puukaiakea vs. Hiaa*, 484; *Kalilikilili vs. Kaina*, 330; *Keliikanakaole vs. Kawaa*, 134; *Kahui vs. Lauki*, 296.
6. Instrument held to be a will, not a deed. *Ah Lo vs. Mung Hui*, 632; *Estate of Kaulii*, 150.
7. Jurisdiction as to revocation of probate considered. *Estate of Kaulii*, 150.
8. Appellant from order admitting will to probate must show *prima facie* that he is an heir at law. *Estate of Bishop*, 288.
9. The law that a will cannot be proved after expiration of five years from death of testator does not apply to wills executed prior to 1859. *Kahui vs. Lauki*, 296.
10. Common law rule as to executor *de son tort* does not apply here. *Frag vs. Adams*, 664.
11. Widow held not liable on a note of her husband, the creditor having failed to comply with the statute as to claims against the estate. *Ib.*
12. Testator devised real estate to his daughter and charged it with payment of debts: held that the daughter could not be reimbursed from residue of the estate. *Beckley vs. Metcalf*, 625.
13. A trust, to the separate use of a married woman, held to vest in executors, under the terms of a will. *Estate of Boardman*, 146.

14. A widow lived at the homestead and incurred debts for support of the children : held, the trustees under the will were liable, as they delegated their authority to her. *Stillman vs. Davies*, 494.
 15. A widow held to be a tenant in common, or to have a right to emblements, in a crop planted on decedent's land, which was sold to pay debts of decedent. *Luha vs. Holt*, 182.
 16. After death of decedent, his widow put L. on the land to cultivate a crop on shares : land was sold to pay debts of decedent : held, L. could claim his half of the crop from the purchaser of the land, and the widow was not estopped to claim her dower in the proceeds. *Luha vs. Fernandez*, 388.
 17. In a conveyance to husband and wife, entire estate vests in wife on husband's death. *Wailehua vs. Leo*, 519.
- See GIFT, GUARDIAN AND WARD.

QUARANTINE. Defined and considered. *The Madras*, 109.

QUO WARRANTO.

1. A defendant in a criminal prosecution, aggrieved by a *de facto* Attorney-General, who is alleged to be not *de jure*, might proceed directly against the officer. *The King vs. Ah Lin*, 59.
2. Quo warranto is not proper remedy against manager of sugar plantation who interferes after his removal, as he is not an officer of the corporation. *Kilauea Sugar Company vs. Macfie*, 3.

RAPE, see CRIMINAL LAW, 11.

REAL ESTATE, see BOUNDARY : DEED : EJECTMENT : JOINT TENANCY : LANDLORD AND TENANT : WAY.

RE-ARGUMENT, see APPEAL : JUDGMENT.

RECORDED INSTRUMENT.

Actual possession of land by a party under unrecorded deed is constructive notice to subsequent purchaser whose deed is recorded. *Achi vs. Kauwa*, 298.

REFORMING OF INSTRUMENTS, see CANCELLATION : DEED : EQUITY : FRAUD : LANDLORD AND TENANT : MISTAKE : PROBATE LAW.

REFUSING SERVICE, see MASTER AND SERVANT.

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RENT, see LANDLORD AND TENANT.

RES GESTAE, see EVIDENCE.

REVENUE LAWS.

1. Are to be construed strictly. *Castle vs. Luce*, 321.
2. Officers of the Customs cannot, without a search warrant, open

goods landed from an inter-island steamer at port not of entry.
The King vs. Aho, 535.

3. An officer without a search warrant held not to be in discharge of his official duty. *Ib.*

See TAX.

RIGHT OF WAY, see WAY.

ROYAL PATENT.

1. Bill to set aside a Patent dismissed, it appearing that the records in the Land Office had been tampered with. *Kalaeokekoi vs. Kahale*, 47.

See JOINT TENANCY, 2.

RULES OF COURT.

1. May be waived, by counsel, when. *Coleman vs. Coleman*, 300.
2. Are subject to control and discretion of Court. *Malani vs. Puhi*, 504.
3. Rule IV. cited. *Hackfeld vs. Ing Choy*, 9; *Estate of Bishop*, 290; *Mutch vs. Holau*, 315.
4. Rule VIII. cited. *Malani vs. Puhi*, 504; *Nakuaimano vs. Ahoi*, 591; *Mutch vs. Holau*, 314.
5. Rule XIV. cited. *Kamalu vs. Lovell*, 181; *Gertz vs. Gertz*, 175.
6. Supreme Court has power to make rules, and its rules are law. *Estate of Bishop*, 288.

SALE.

1. Sale of shares of stock set aside for the false representations of the seller as to the value of the stock, upon which the buyer acted, although he could, by diligent enquiry, have ascertained that they were false. *Wilcox vs. Ellis*, 335.
2. A sale of a sugar plantation at an exaggerated price, to a person of impaired mind, set aside. *McKeague vs. Kennedy*, 347.
3. Vendor of a railway, included in a mortgage by vendee to a third party, held to have no right to remove the railway under the plea that the sale was conditional. *Fowler vs. Heeia Sugar Co.*, 410.
4. Leaving five certificates of stock to be changed into one, after a sale, held not to make the sale incomplete. *Ellis vs. Wilcox*, 236.
5. If no conflict of evidence, question of delivery and acceptance is for the Court: if evidence is conflicting, it is for the jury. *Ib.*
6. Defendant held liable to pay plaintiff, a consignor of fruit, the highest price received for any similar lot of fruit shipped by the same vessel, provided plaintiff shipped good, marketable fruit. *Robinson vs. Sresovich*, 618.
7. Advertisement of assignees in bankruptcy for bids, considered: and held, that bids must be for cash: that offer of \$100 more than highest bid is invalid: and that assignees are not obliged to receive the highest or any bid. *McDonald vs. Green*, 325.

8. Shipment of goods held to be a consignment, not a sale. *Merrill vs. Jaeger*, 475.
9. Bill to set aside sale of shares of stock, alleged to have been made under fear and duress, dismissed: the evidence being extremely improbable. *Cummings vs. McCrosson*, 389.

SALE OF LAND, see DEED: EJECTMENT: MORTGAGE: SPECIFIC PERFORMANCE.

SEARCH WARRANT.

1. Is defective, failing to allege that the article is "necessary to be produced as evidence or otherwise in a criminal trial." *See Hop vs. Chillingworth*, 537.
2. Officers of the Customs cannot, without a search warrant, open goods landed from an inter-island steamer at a port not of entry. *The King vs. Aho*, 565.

SEDUCTION, see MASTER AND SERVANT, 1.

SELF DEFENSE, see CRIMINAL LAW, 21.

SEPARATION, see HUSBAND AND WIFE.

SERVANT, see MASTER AND SERVANT.

SLANDER, see LIBEL.

SPECIFIC PERFORMANCE.

1. Plaintiff agreed to sell to defendant land of an area of 650 acres more or less: the real area proved to be 258 acres, and defendant claimed a reduction in price: held, under the circumstances, that defendant could elect whether specific performance be decreed without compensation, or the sale annulled, plaintiff to pay enhanced market value of the land by reason of defendant's improvements. *Wood vs. Dillingham*, 834.
2. Right to compel specific performance is not absolute, but rests in discretion of the Court. *Andrews vs. Mendonca*, 446.
3. Plaintiff held to have lost the right to claim specific performance, by allowing his rights to lie too long in abeyance. *Ib.*

See BANKRUPTCY, 1, 2: LANDLORD AND TENANT, 13.

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A. GENERAL PRINCIPLES.

1. Construction of a statute by the Privy Council, though not binding on the Court, is entitled to great weight, as being contemporaneous interpretation by a department of the executive. *Bell Telephone vs. Mutual Telephone*, 456.
2. Revenue laws are to be construed strictly. *Castle vs. Luce*, 321.
3. Tax on insurance policies "issued during the year," held to apply only to new policies, not to annual premiums on a life policy. *Ib.*

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4. A statute as to cruelty to animals held not to authorize imprisonment. *The King vs. Tai Wa*, 598.
5. Statutory procedure prescribed for enforcing fire ordinance must be followed strictly. *The King vs. Tong Wo*, 20; *Maguire vs. Tong Wo*, 41.
6. Statutory remedy for taking of land for public use, supersedes remedy at common law. *Herring vs. Gulick*, 57.

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5. Member of military company, exempt from personal taxes, is entitled to personally receive a tax receipt endorsed with words "Qualified to Vote." *Hipa vs. Luce*, 520.

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1. Chapter 45, Laws of 1874, covers telephone companies. *Bell Telephone vs. Mutual Telephone*, 456.
2. A company need not obtain written consent of Minister of Interior. *Ib.*
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TIME, see DATES, DAYS.

TITLE TO LAND, see BOUNDARY, DEED, EJECTMENT, EQUITY, JOINT TENANCY, LANDLORD AND TENANT, WAY.

TRESPASS does not lie against Marshal of the Kingdom, acting under process of Court, for misfeasance in executing process. *Ah Hong vs. Parke*, 531.

TREATY, see *The Madras*, 109: *In re McCarthy*, 573.

TRUST.

1. Trust-deed, without power of revocation, held not revocable by the maker on ground of mistake, the mistake, if any, being of law. *Afong vs. Afong*, 191.
2. L. C. A. 721 is headed "Mahuka and Kaai," but the land is awarded to Mahuka: held, there is no trust in Mahuka for Kaai. *Kaai vs. Mahuka*, 354.

3. Express trust may be created by parol in personal property ; if continuing, statute of limitations does not run. *Kamihana vs. Glade*, 497.
4. Evidence failing to show trust in a master as to servant's wages, statute of limitations runs against claim. *Ib.*
5. A valid trust to the separate use of the married daughter of testator, held to have been created by will, and to have vested in the executors on the testator's death. *Estate of Boardman*, 146.
6. Trustee should keep accurate books of account: if not, every intentment of fact will be made against him. *Hart vs. Kupu*, 190.
7. Trustees should be allowed reasonable compensation. *Ib.*

See PROBATE LAW, 14.

USE, see TRUST.

USER, see WATER, WAY.

UTTERING FORGED PAPER, see CRIMINAL LAW, 16, 17, 18.

VENDOR AND VENDEE, see DEED, EJECTMENT, MORTGAGE, SPECIFIC PERFORMANCE.

VERDICT, see COURT AND JURY: NEW TRIAL.

WATER.

1. Judgment of Commissioners of Water Rights, signed by only one of them, is void. *Maikai vs. Hastings*, 1.
2. Rights in Kamailili and Waikiki, Honolulu, considered, and decision of Commissioners modified. *Liliuokalani vs. Pung Sam*, 13.
3. Supreme Court has only appellate jurisdiction from Commissioners of Private Ways and Water Rights, and will not on appeal complete a decision that was never made. *Loo Chit Sam vs. Wong Kim*, 130.
4. Principal duty of Water Commissioners is to determine upon evidence, and to define what were the ancient and prescriptive rights in controversy. *Ib.*
5. To decide that certain lands are entitled to water, and not to say how much, is not sufficient. *Ib.*
6. Holders of Land Commission awards are entitled to water from streams in their land: tenants at sufferance under the konohiki must look to him for their water. *Maikai vs. Hastings*, 133.
7. Rice patches on land anciently kula. *Loo Chit Sam vs. Wong Kim*, 200.
8. Rights and duties of Commissioners considered at length. *Davis vs. Afong*, 216.
9. On appeals from the Commissioners, new evidence may be introduced. *Ib.*
10. Taro patches of the konohiki are entitled to water from springs on the land. *Ib.*
11. Subterranean springs and percolation. *Ib.*
12. Decree of Commissioners modified. *Kaanaana vs. Richardson*, 235.

13. Damage to adjacent land by opening water-way: see *Lopez vs. Acheu*, 607.
14. Meaning of the words "Furnished with water." *Chulan vs. Princeville*, 88.
15. Taking water for public use: see *Herring vs. Gulick*, 57.
16. Authority of Minister over water-supply in a town in case of fire. *Way vs. Gulick*, 70.
17. Commissioners are authorized to make just and equitable decisions. *Achi vs. Poni*, 176.

WAY.

1. Grantor has a right of way by necessity, over his land sold, to his remaining land *Achi vs. Poni*, 176.
2. Commissioners are authorized to make just and equitable decisions, not contrary to general principles of law. *Ib.*
3. Right of way by necessity held to exist. *Kawika vs. Pakeokeo*, 293.
4. Easement by user, so far as it depends on an award by grant, runs from date of the award: if based on a kuleana award, proof of user may run from time antecedent to award. *Swan vs. Colburn*, 395.
5. There may be a gate across a private way without assertion of a right to close the way. *Ib.*
6. As to duties of Commissioners, see WATER.

WIDOW, see HUSBAND AND WIFE: PROBATE LAW.

WIFE, see HUSBAND AND WIFE: PROBATE LAW.

WILL, see PROBATE LAW.

WORDS.

- Absence, see *The King vs. Kekoa*, 624.
 And, see *Chapin vs. Tisdale*, 52.
 Cruelty, see *Coleman vs. Coleman*, 260.
 Game, see *The King vs. Ah Lee*, 545.
 Haawi, see *Kalihilihi vs. Kaina*, 330.
 Hooilina, see *Kalihilihi vs. Kaina*, 330.
 Insolvent, see *Parke vs. Lau Ng*, 518.
 Issued, see *Castle vs. Luce*, 321.
 Laches, see LACHES.
 Master, see *Board of Immigration vs. Estrella*, 211.
 More or Less, see *Wood vs. Dillingham*, 634.
 Necessaries, see HUSBAND AND WIFE.
 Par, see *Castle vs. Kapena*, 27.
 Quarantine, see *The Madras*, 109.

See CONSTRUCTION.

WRIT OF ERROR.

1. Lies from Supreme to Police Court. *Peacock vs. Lovejoy*, 231.
2. Brings up only errors of law that appear on the record. *Ib.*

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